



**UNIVERSITY OF CAPE TOWN**  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

**THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PROMOTING  
AND PROTECTING THE RIGHTS OF REFUGEES:  
THE CASE OF SOUTH AFRICA AND KENYA**

by

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SUBMITTED TO THE UNIVERSITY OF CAPE TOWN  
in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law

UNIVERSITY OF CAPE TOWN

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**Dedication**

For my parents,  
Timothy and Julia Makunda

## Acknowledgements

I would like to express my sincere gratitude to my husband, Johannes, and my two amazing children; Lemaiyan and Naserian - you have been especially gracious with their time. Thank you for your love and support throughout this journey, which has, at many times, been arduous. Johannes, thank you for believing in me.

I am eternally grateful to my dear parents, Timothy and Julia for being a constant source of inspiration and whose example I can only hope to live up to. Thank you for all your love, prayers, support, guidance and sacrifices over the years.

To my siblings, Lijoodi, Sasakah, Achitsa, Lukania, Katavach and Khatievi - my permanent pillars of love and support. Thank you for always being there without hesitation. To my extended family, in particular, Hawa, Hans, Cynthia, David and Amany. To my dear friends, Gathigia and Neera - my added layer of unwavering love and support; and Natalie for always finding a reason to cheer me on and for reminding me to take break every so often.

I am indebted to my supervisor, Prof Rashida Manjoo for all her support and guidance, for encouragement in maintaining focus, for the invaluable feedback, promptly providing comments on the drafts, and for making the supervision of this thesis a welcome part of the journey.

I am grateful to all participants in this study, without whom this research would be incomplete.

This study was partially supported with funds from the National Research Foundation and the University of Cape Town. I thank both institutions for their financial support, which played an integral part in the completion of this study.

## **Abstract**

The apparent normative and implementation gaps within the international refugee protection regime suggest the need to reform its implementation and accountability processes. Increasingly, the focus is being shifted to local or domestic actors to attempt to address the challenges faced in realising refugee rights effectively. Among the key domestic accountability actors for the realisation of rights, are national human rights institutions (NHRIs). NHRIs are considered a bridge between the international and domestic human rights systems. NHRIs act as entities that facilitate the diffusion of international human rights norms and standards, including those with respect to refugee rights, into the national spheres. Notwithstanding this, there is paucity in empirical evidence within the refugee rights discourse on the role that NHRIs can play to promote the effective realisation of refugee rights. This study explores the role that NHRIs in South Africa and Kenya play in promoting and protecting refugee rights. It utilises a non-doctrinal and qualitative research approach, to examine the extent to which the NHRIs engage with refugee rights and to explore their capacity to do so effectively. It situates NHRIs within the nexus between international human rights law and international refugee law to frame the understanding for their role within the refugee protection regime.

The findings indicate that the NHRIs in South Africa and Kenya that are compliant with the Paris Principles display significant engagement with refugee rights promotion and protection. As accountability mechanisms, they have contributed to the development and implementation of domestic refugee law and policy in accordance with international norms and standards. This has occurred despite the lack of an explicit refugee rights' promotion and protection mandate, but they face barriers and challenges. Various underlying factors that impede their effectiveness to address refugee rights were identified. These included the socio-political contexts within which they operate, capacity constraints and invisibility within the refugee protection regime. The socio-political challenges included xenophobia and the securitisation of the asylum space. These compounded organisational and operational weaknesses such as scarce specialist skills in refugee law, limited financial resources, and the absence of strategic and sustained partnerships for refugee rights protection. The overall absence of norms for NHRI engagement with refugee rights was identified as a contributory factor for the lack of a coherent approach for promoting and protecting these rights. Possible avenues to enhance NHRI engagement with refugee rights were identified. For instance, NHRIs building partnerships for refugee rights promotion and protection with CSOs, the

UNHCR and regional institutions based on a clear understanding of an NHRI's role as accountability mechanisms. For NHRIs, the imperative lies in building their capacity to address refugee rights to ensure a clear understanding of what the promotion and protection of these rights entails.

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## Chapter 1

### Introduction

#### 1.1 Background and context of the study

The most recent statistics from the Office of the United Nations High Commissioner for Refugees (UNHCR) estimates the number of refugees and people in refugee-like situations in sub-Saharan Africa at approximately 6.3 million.<sup>1</sup> South Africa and Kenya, which are the focus of this study, host large numbers of refugees and asylum seekers. Kenya hosts over 420,000 refugees and about 50,000 asylum seekers while South Africa hosts approximately 90,000 refugees and over 184,000 asylum seekers.<sup>2</sup> Given the fragility that the countries of origin continue to face, it is more likely that both South Africa and Kenya will continue to receive and host refugees and asylum seekers for a significant period of time.

This is a situation that many host countries across the globe face.<sup>3</sup> Thus, in the context of this global challenge to find a permanent solution to the refugee problem, there is renewed discourse on the need to reform the international protection regime for refugees.<sup>4</sup> On-going debates focus not only on reforming the international protection regime itself, but also reforming its implementation to include a defined role for actors such as national human rights institutions (NHRIs).<sup>5</sup>

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<sup>1</sup> UNHCR, *Global Trends: Forced Displacement in 2018*, (Geneva: UNHCR, 2019), accessed 10 January 2020, <https://www.unhcr.org/5d08d7ee7.pdf>, 14. The UNHCR 2019 figures for refugee and asylum seekers will be made available in mid-2020.

<sup>2</sup> UNHCR, *Global Trends: Forced Displacement in 2018*, 66 and 67.

<sup>3</sup> UNHCR, *Global Trends: Forced Displacement in 2018*, “Protracted Refugee Situations,” 22-26. UNHCR estimates that 78 per cent of all refugees are in protracted situations. (22). In South Africa, refugees and asylum seekers from Somalia and DRC are in a protracted situation; in Kenya those from Somalia and South Sudan are deemed to be in a protracted situation. (22-23).

<sup>4</sup> See for instance Khalid Koser, *Reforming the International Protection Regime: Responsibilities, Roles and Policy Options for Australia*, (Sydney: Lowy Institute for International Policy 2016), 3.

<sup>5</sup> Khalid Koser, *Reforming the International Protection*, 3; Richard Carver, “A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law,” *Human Rights Law Review* 10:1 (2010) 1-32; Brian Gorlick, “Human Rights and Refugees: Enhancing Protection through International Human Rights Law,” *New Issues in Refugee Research Working Paper* 30 (2000) 23; Harvard Law School’s Human Rights Program, “The Role of National Human Rights Institutions in Detention Monitoring” (paper presented at the ICC22 Workshop on Detention, Geneva, Switzerland, 23 March 2009).

NHRIs are institutions established by States to specifically promote and protect human rights.<sup>6</sup> The UN Economic and Social Council (ECOSOC) was the first entity to consider the potential impact that NHRIs could have in realising human rights norms and standards.<sup>7</sup> In 1946, the ECOSOC recommended that UN Member States consider creating entities to advance the work of the UN Human Rights Commission domestically.<sup>8</sup> It was, however, not until 1993, following the adoption of the Vienna Declaration and Programme of Action (Vienna Declaration) as the outcome document of the World Conference on Human Rights, that attention focused on NHRIs.

The Vienna Declaration identified NHRIs as integral components of an effective domestic implementation and monitoring framework for human rights and included some specific roles that NHRIs play that would influence such a process.<sup>9</sup> The 1995 Beijing Declaration and Programme of Action (Beijing Declaration) also emphasised the importance of creating or strengthening national mechanisms tasked with promoting women's rights and mainstreaming gender equality to ensure the realisation of the objectives of the Beijing Declaration.<sup>10</sup> In addition, there are treaties that make specific provisions for NHRIs to be part of the domestic monitoring framework. These include the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the UN Convention against Torture (OPCAT)<sup>11</sup>. The UN has also regularly through numerous resolutions, emphasised the necessity to include NHRIs in human rights processes.<sup>12</sup>

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<sup>6</sup> OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities (Handbook on NHRIs)* (Geneva: UN, 2010), 13-14.

<sup>7</sup> Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of United Nations*. (Copenhagen: Danish Institute for Human Rights 2006), 30-117.

<sup>8</sup> UN, "ECOSOC Resolution 9 (II), 21 June 1946," UN, accessed 18 April, 2017, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/56/REV.2](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/56/REV.2)

<sup>9</sup> UN, "World Conference on Human Rights: Vienna Declaration and Programme of Action, A/CONF.157/23, 1993," UN, accessed 18 April, 2017, <http://www.un-documents.net/ac157-23.htm>

<sup>10</sup> UN, "Beijing Declaration and Programme of Action, 1995," UN, accessed 7 July 2017 <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

<sup>11</sup> UN, "Convention on the Rights of Persons with Disabilities (A/RES/61/106)," UN, accessed 26 February, 2018 [http://www.un.org/disabilities/documents/convention/convention\\_accessible\\_pdf.pdf](http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf), Article 33 (2): UN, "Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or

At the regional level, the African Charter on Human and Peoples' Rights (Banjul Charter) in Article 26 requires States to establish and improve appropriate national institutions mandated to promote and protect human rights.<sup>13</sup> Furthermore, the African Commission on Human and Peoples' Rights, the regional entity that oversees the implementation of the Banjul Charter, recognises NHRIs through the affiliate status.<sup>14</sup> This recognition allows NHRIs to participate directly in its work. Given these developments with respect to NHRIs, it could therefore be concluded that NHRIs ought to be constituent components of an effective human rights implementation framework, including one that encompasses refugee rights.

## 1.2 Problem statement

Refugees have been recognised as persons of concern throughout history.<sup>15</sup> It was however, not until the League of Nations came into existence that there was the acknowledgement of the international responsibility to provide protection to refugees and to find lasting solutions for the refugee problem.<sup>16</sup> Initially, international protection for refugees was limited to specific categories until 1951 when the Convention relating to the Status of Refugees (1951 Convention) was adopted and further amended in 1967 to expand the scope of the definition

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Punishment (A/RES/57/199),” *UN*, Articles 18-20, accessed 26 February, 2018

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

<sup>12</sup> Both the UN General Assembly and the Human Rights Council conclude resolutions relating specifically to NHRIs, and the UN Secretary General is required to report on the UN's support to strengthening NHRIs' capacity. See following reports A/HRC/10/54, A/HRC/4/91, A/HRC/13/44, A/HRC/7/69, E/CN.4/2006/101 and resolutions A/RES/70/163, A/RES/52/128.

<sup>13</sup> ACHPR, “African Charter on Human and People's Rights,” *ACHPR*, accessed 16 November, 2017. <http://www.achpr.org/instruments/achpr/>. South Africa signed and ratified the treaty in 1996 and Kenya ratified it in 1992.

<sup>14</sup> ACHPR, “Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized Human Rights Institutions in Africa - ACHPR/Res. 370 (LX) 2017,” accessed 10 November, 2017, <http://www.achpr.org/sessions/60th/resolutions/370/>. The ACHPR had previously adopted a similar resolution in 1998: *Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa* accessed 10 November, 2017. <http://www.achpr.org/sessions/24th/resolutions/31/>

<sup>15</sup> UNHCR, *An Introduction to International Protection*, (Geneva: UNHCR, 2005), 5; S Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), 5-35.

<sup>16</sup> Gilbert Jaeger, “On the History of the International Protection of Refugees,” *IRRC* 83(2001): 727-736.

of a refugee.<sup>17</sup> Subsequent regional agreements such as the 1969 OAU [AU] Convention on the Specific Aspects of Refugee Problems in Africa (OAU Convention) expanded the UN definition, to include grounds for refugee recognition because of mass displacement.<sup>18</sup>

Despite the existence of binding international agreements, the international refugee protection regime has not been successful in ensuring adequate protection for refugees and those seeking asylum.<sup>19</sup> While the 1951 Convention plays an important part in the promotion and protection of refugee rights, there are problems relating to its normative framework and its application as the central source of international refugee law.<sup>20</sup> For instance, in terms of normativity, the 1951 Convention does not provide a universal definition of ‘persecution’, which leaves individual States with ample room to determine the applicable content of the term.<sup>21</sup>

This has inevitably resulted in political will being the basis for States’ implementation of the Convention, rather than human rights considerations linked to refugee protection.<sup>22</sup> For example, recent State practice in dealing with large-scale forced migration crises such as the mass influx of asylum seekers into Europe, point to the dominance of major political concerns over States meeting their obligations under binding treaty law in the attempt to resolve refugee matters.<sup>23</sup> Furthermore, while the 1951 Convention defines a refugee it does not provide the process to carry out the determination of this status.<sup>24</sup>

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<sup>17</sup> Following the end of World War I, The League of Nations established various offices and mandates to deal with Russian refugees, persons displaced following the collapse of the Ottoman Empire and those fleeing Nazi Germany. See Gilbert Jaeger, “On the History of the International,” 727-736; Article 1(2) of the 1967 Protocol removed the geographical and time limitations imposed by the refugee definition contained in Article 1(2) of the 1951 Refugee Convention

<sup>18</sup> OAU Convention, Article I (2)

<sup>19</sup> Koser, *Reforming the International Protection*, 3

<sup>20</sup> Guy S. Goodwin-Gill, “The International Law of Refugee Protection,” in *The Oxford Handbook of Refugee and Forced Migration Studies* eds., Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, (Oxford: Oxford University Press, 2014), 42-45; See discussion in Chapter 3 on the international refugee protection regime.

<sup>21</sup> Joan Fitz-Patrick, “Revitalising the 1951 Convention” *Harvard Human Rights Journal* 9 (1996), 240.

<sup>22</sup> Fitz-Patrick, “Revitalising the 1951 Convention,” 240

<sup>23</sup> Azfer Ali Khan, “Can International Law Manage Refugee Crises?” *Oxford University Undergraduate Law Journal* (2016), 61. All EU Member States are State Party to the 1951 Refugee Convention however the attempts to deal with the large influx of asylum seekers and other migrants into Europe raised questions about

Another problem as Hathaway, North and Pobjoy point out, relates to implementation, as the 1951 Convention did not create a treaty body tasked with supervising the implementation of the treaty and thus hold States accountable for failures with respect to their protection obligations.<sup>25</sup> Unlike other human rights treaties, no independent monitoring process exists to monitor compliance and provide a coherent interpretation of international refugee law across State Parties to the Convention.<sup>26</sup> The term ‘implementation’ is used here to refer to individual State’s compliance with human rights standards and all initiatives taken by States and other actors to enhance respect for human rights and prevent violations.<sup>27</sup> Monitoring, as applied here, refers to the processes that seek to determine whether States are adhering to human rights standards.<sup>28</sup> It involves systematically gathering information about the human rights situation in a country or region over time.<sup>29</sup> The information gathered is

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the Members’ commitment to their obligations under international law. For instance, the EU-Turkey deal signed in March 2015, which focused on forced relocation of “irregular Syrian migrants” from Greece back to Turkey, was criticised for the high risk that its implementation would not meet international norms including *non refoulement*.

See Elizabeth Collett, “The Paradox of the EU-Turkey Refugee Deal,” accessed 25 January, 2018 <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>: Despite the agreement being legally binding on EU Member States, the EU reported reluctance from groups of State to implement it arising from political differences and lack of political will to commit to addressing the refugee crisis in Europe. See Susi Dennison & Josef Janning, “Bear Any Burden: How EU Governments Can Manage the Refugee Crisis,” *ECFR/167*, April 2016, 2-3 [http://www.ecfr.eu/page/-/Bear-Any-Burden\\_Dennison-Janning.pdf](http://www.ecfr.eu/page/-/Bear-Any-Burden_Dennison-Janning.pdf); The Turkish Government also declined to reform its refugee protection framework to comply fully with the 1951 Refugee Convention. See Vicky Stavropolous, “Refugee Protection in Turkey: Evaluating Needs and Challenges,” *Chicago Policy Review*, (January 2, 2017), accessed 25 January 2018. <http://chicagopolicyreview.org/2017/01/02/refugee-protection-in-turkey-evaluating-needs-and-challenges/>

<sup>24</sup> Azfer Ali Khan, “Can International Law Manage Refugee Crises,” 59.

<sup>25</sup> James C. Hathaway, Anthony M. North and Jason M. Pobjoy, “Supervising the Refugee Convention: Introduction,” *Journal of Refugee Studies*. 26:3 (2013): 323-6.

<sup>26</sup> Hathaway, North and Pobjoy, “Supervising the Refugee Convention,” 323-6.

<sup>27</sup> Icelandic Human Rights Centre, “Implementation,” *Icelandic Human Rights Centre: Human Rights Project*, accessed 12 August 2020, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/implementation>

<sup>28</sup> OHCHR, *OHCHR Training Manual on Human Rights Monitoring*, (OHCHR: Geneva, 2011), 9; UN Women, “What is Human Rights Monitoring,” last edited December 21, 2011, <http://www.endvawnow.org/en/articles/994-what-is-human-rights-monitoring.html>; Dana Buhl, *Ripple in Still Water: Reflections by Activists on Local and National-Level Work on Economic, Social and Cultural Rights: Monitoring*, (Institute of International Education: Washington, DC, 1996), accessed 12 August 2020, <http://hrlibrary.umn.edu/edumat/IHRIP/ripple/chapter4.html#whatmonitor>

<sup>29</sup> OHCHR, *Training Manual on Human Rights Monitoring*, 9; UN Women, “What is Human Rights Monitoring,”; Dana Buhl, *A Ripple in Still Water*.



then documented and disseminated with the aim of remedying human rights violations.<sup>30</sup> For instance, treaty bodies monitor the implementation by reviewing periodic State reports, engaging in constructive dialogue with State representatives and issuing concluding observations, which States are required to implement.<sup>31</sup>

With respect to the 1951 Convention, Article 35 requires the UNHCR to supervise the application of the provisions of the Convention. In contrast, the UNHCR's founding mandate defines its role as one that facilitates and coordinates refugee protection.<sup>32</sup> The UNHCR's mandate does not grant it the authority to declare breaches of the 1951 Convention, nor does it provide for the UNHCR to authoritatively decide the meaning of the treaty.<sup>33</sup> In addition, in several countries, the UNHCR has become the main implementer of the Convention leading to questions about its own supervision.<sup>34</sup> Furthermore, Article 38 provides that should a dispute relating to "interpretation or application" of the Convention arise, the International Court of Justice can be approached to settle it.<sup>35</sup> In practice, however, this provision has never been invoked.<sup>36</sup>

Hathaway, North, Pobjoy, Byrne and Greim have proposed ways through which the implementation and monitoring challenges can be overcome by establishing new monitoring mechanisms for the 1951 Convention. The proposals include: setting up a Permanent Sub-Committee on Review and Monitoring and a Special Rapporteur; or a UNHCR Advisory Committee tasked with issuing general comments and advisory opinions; creating a Refugee

<sup>30</sup> OHCHR, *Training Manual*, 9; UN Women, "What is Human Rights Monitoring,"; Dana Buhl, *A Ripple in Still Water*.

<sup>31</sup> Benjamin Mason Meier, Marlous De Milliano, Averi Chakrabarti and Yuna Kim, "Accountability for the Human Right to Health through Treaty Monitoring: Human Rights Treaty Bodies and the Influence of Concluding Observations," *Global Public Health* 13, no. 11 (2018): 1558-1576, DOI: 10.1080/17441692.2017.1394480

<sup>32</sup> Hathaway, North and Pobjoy, "Supervising the Refugee Convention," 323.

<sup>33</sup> Hathaway, North and Pobjoy, 323.

<sup>34</sup> Hathaway, North and Pobjoy, 323; Tamara Greim, "Experimentalist Governance and International Refugee Law: New Ideas for Supervising the 1951 Convention," *SSRN* (2016): 20, accessed 10 June, 2017, <http://dx.doi.org/10.2139/ssrn.2949788>.

<sup>35</sup> 'Any dispute between the parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute [...]'

<sup>36</sup> Hathaway, North and Pobjoy, "Supervising the Refugee Convention," 324.

Rights Committee tasked with receiving State reports and the publication of a 'Refugee Watch' Annual Report; or establishing an independent judicial commission capable of producing authoritative but non-binding opinions.<sup>37</sup> Criticism of such proposals vary but include the requirement of a new protocol to the 1951 Convention to support the suggested reporting obligations for States and the likelihood of the UNHCR's mandate being undermined by other structures should these be created.<sup>38</sup>

In 2018, States adopted the Global Compact on Refugees, which includes the implementation of a comprehensive refugee protection framework.<sup>39</sup> While this action may imply renewed commitment to finding a lasting solution to the refugee problem, this agreement and proposed further action are not binding. Its implementation will rest largely on political will, rather than meeting binding obligations for refugee protection, particularly as prescribed by international refugee law.

The above-mentioned challenges coupled with other factors such as perpetual funding shortfalls for refugee protection, the resistance by States to share the burden and responsibility to protect have contributed to both the normative, and implementation gaps within the international refugee protection regime.<sup>40</sup> Despite arguments in favour of definitively addressing these gaps, there has not been any significant action by State Parties to solve the problem inherent in the 1951 Convention.<sup>41</sup> The result is that regional

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<sup>37</sup> Hathaway, North and Pobjoy, 324; Also James C. Hathaway, A. C. North, and Rosemary Byrne, "The Future of Refugee Convention Supervision: Summary Conclusions" (Paper presented after the Roundtable on the Future of Refugee Convention Supervision, Cambridge, United Kingdom, September 28-29, 2012); Tamara Greim, "Experimentalist Governance and International Refugee Law," 15-19.

<sup>38</sup> Greim, "Experimentalist Governance," 20-22.

<sup>39</sup> UNHCR, "The Global Compact on Refugees," *UNHCR*, accessed 8 October, 2019 <https://www.unhcr.org/the-global-compact-on-refugees.html>.

<sup>40</sup> Azfer Ali Khan, "Can International Law Manage," 64.

<sup>41</sup> There is extensive scholarship on the need to review the international refugee protection regime. See Elizabeth J Lentini, "The Definition of Refugee in International Law: Proposals for the Future," *Boston College Third World Law Journal* (1985): 184, 186-189, 198, accessed 22 June 2017, <http://lawdigitalcommons.bc.edu/twlj/vol5/iss2/5>; Khalid Koser, *Reforming the International Protection*; Carver, "A New Answer 1-32; Gorlick, "Human Rights and Refugees; Harvard Law School's Human Rights Program, "The Role of NHRIs in Detention; Azfer Ali Khan, "Can International Law Manage Refugee Crises," Hathaway, North and Pobjoy, "Supervising the Refugee Convention; Greim, "Experimentalist Governance."

instruments, such as the OAU Convention, which provide broader legal protection, may be better tools for protecting refugees.<sup>42</sup>

In addition, attention is now being given to other mechanisms in an attempt to address the normative and implementation gaps at both the international and domestic levels.<sup>43</sup> As the implementation of refugee law occurs at the domestic level, there are possibilities for local institutions such as CSOs and domestic legal entities such as NHRIs to influence the development of a domestic protection regime favourable to refugees. This may in turn influence outcomes at the international level. Despite this recognition of the role that NHRIs can play within the refugee protection framework, there is limited evidence to indicate that NHRIs have effectively contributed to the promotion and protection of refugee rights. This assertion forms part of the premise underlying this study.

### **1.3 Rationale and significance of the study**

National human rights institutions, as discussed above, have been identified as one of the human rights mechanisms that could play a role in filling the normative and implementation gaps within the international refugee protection regime. However, there is limited evidence about NHRIs performing a role within the context of refugee protection.<sup>44</sup> The existing research on NHRIs has focused largely on their nature, legal mandates, function, and general

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<sup>42</sup> UNHCR recognises refugees who fall within the OAU Convention definition. See UNHCR, *Global Trends 2015* note 6, 54; Kenya signed the treaty in 1969 and ratified it in 1992 while South Africa signed and ratified the treaty in 1995 <http://www.achpr.org/instruments/refugee-convention/ratification/>

<sup>43</sup> Elizabeth Ferris, “Protracted Refugee Situations, Human Rights and Civil Society,” in *Protracted Refugee Situations: Political, Human Rights and Security Implications*, edited by Gill Loescher et al. (NY: United Nations University Press, 2008) 93.

<sup>44</sup> Goodman and Pegram state: “If the presence of NHRIs in the international human rights regime is becoming a settled fact, the significance of this new class of formal organisations is still undertheorised and not well understood. This lacuna is due, in part, to the recent nature of the NHRI surge. Early debates on the merits of NHRI formation commonly veered between dismissive critique and unmitigated support. Neither position was strongly established in evidence. And the early literature focused on very general trends of diffusion and exceedingly formal features in the design of institutions.” Ryan Goodman and Thomas Pegram, “National Human Rights Institutions, State Conformity, and Social Change,” in *Human Rights, State Compliance and Social Change*, eds. Ryan Goodman and Thomas Pegram, (Cambridge: Cambridge University Press, 2012), 3.

effectiveness in promoting and protecting human rights as well as their role as the link between the international and domestic human rights frameworks.<sup>45</sup>

Given that the refugee problem continues to persist and has increased in complexity, the recognition of the role of NHRIs within the refugee protection context and their potential to enhance the refugee protection regime warrants an understanding based on evidence. This study explored the extent to which NHRIs in South Africa and Kenya have played a role in promoting and protecting refugee rights. In addition, this study explored the challenges these NHRIs face in fulfilling this role. It also identified opportunities for these NHRIs to enhance their engagement with the promotion and protection of refugee rights. The significance of this study is that it provides empirical evidence to support the argument that NHRIs should be considered integral components of efforts to advance refugee protection. This study also identified challenges or barriers to the NHRIs' effectiveness and discerned opportunities to strengthen their capacities to influence positive outcomes for refugee protection.

#### **1.4 Aims, objectives and research questions**

This study explored the nature and extent of the role that NHRIs in South Africa and Kenya play within the refugee protection regime. The specific objectives of this study were:

1. To identify the normative gaps in international and regional refugee law and institutional gaps within the refugee protection regime in order to highlight the potential that NHRIs could play within the refugee protection regime;
2. To explore the extent to which NHRIs in South Africa and Kenya address refugee rights;

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<sup>45</sup> Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, (Copenhagen: Danish Human Rights Institute, 2006); Sonia Cardenas, *Chains of Justice, The Global Rise of State Institutions for Human Rights* (Pennsylvania: University of Pennsylvania Press, 2014); United Nations Office of the High Commissioner for Human Rights (OHCHR), *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Geneva: United Nations, 2010).

3. To identify the challenges and barriers that impact on NHRIs' capacity to effectively promote and protect refugee rights in South Africa and Kenya; and
4. To make recommendations for further research on NHRIs' capacity to effectively promote and protect refugee rights in Africa.

The main research questions that this study answered were:

1. Do NHRIs in South Africa and Kenya have the capacity and capability to effectively promote and protect refugee rights?
2. To what extent are NHRIs in South Africa and Kenya addressing refugee rights in their respective States?
3. Are there any challenges or barriers that impact on the NHRIs' responsibility to effectively promote and protect refugee rights in South Africa and Kenya respectively?
4. How can the NHRIs in South Africa and Kenya strengthen their capacities to effectively promote and protect refugee rights?

### **1.5 Scope of the study**

The units for this study were the three primary national human rights institutions in South Africa and Kenya. In the case of South Africa, these were the South African Human Rights Commission, the Commission for Gender Equality and the Office of the Public Protector (Ombudsman). In Kenya, these were the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice (Ombudsman). This study focused on exploring the extent of their engagement with the refugee protection regime at international, regional and domestic levels.

## 1.6 Clarification of key concepts

*Asylum.* Asylum is not defined in any international instrument.<sup>46</sup> However, asylum is understood to be “the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it.”<sup>47</sup>

*Asylum Seeker.* Asylum seeker refers to a person who has left his/her country of origin and formally applied for asylum in another country but whose claim has not yet been concluded.<sup>48</sup> Asylum seekers are those in need of international protection.<sup>49</sup> UNHCR interprets its mandate to include asylum seekers as long as they meet the above criteria.<sup>50</sup>

*Refugee.* International refugee law through the 1951 Convention (supplemented by the 1967 Protocol) provides a definition of a refugee (Convention definition). In the African context, the definition set out in the OAU Refugee Convention provides a broader definition for a refugee. It is the definition widely in use by African states in their domestic legal frameworks and the UNHCR applies it in its activities in Africa.<sup>51</sup> The UN Convention defines a refugee as a person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

<sup>46</sup> Guy S. Goodwin-Gill, “International Law of Refugee Protection,” 42.

<sup>47</sup> María-Teresa Gil-Bazo, “Asylum as a General Principle of International Law,” *International Journal of Refugee Law* 27, Issue 1 (1 March 2015): 3–28. <https://doi.org/10.1093/ijrl/eeu062>.

<sup>48</sup> UNHCR, *Asylum Seekers*, UNHCR, accessed 15 May, 2017, <http://www.unhcr.org/asylum-seekers.html>.

<sup>49</sup> UNHCR, *Asylum Seekers*.

<sup>50</sup> UNHCR, *Asylum Seekers*.

<sup>51</sup> Rainer Hoffman, “Refugee Law in the African Context,” 323.

[http://www.zaoerv.de/52\\_1992/52\\_1992\\_2\\_a\\_318\\_333.pdf](http://www.zaoerv.de/52_1992/52_1992_2_a_318_333.pdf); UNHCR has a broader definition including those recognised under its Statute; individuals granted complementary forms of protection; those enjoying temporary protection and since 2007, includes people in a refugee-like situation. UNHCR, “UNHCR Population Statistics Database,” accessed 10 January 2020,

[http://popstats.unhcr.org/en/overview#\\_ga=2.71771280.248027302.1578911960-169466686.1578911960](http://popstats.unhcr.org/en/overview#_ga=2.71771280.248027302.1578911960-169466686.1578911960);

Volker Türk also asserts that “the term refugee is interpreted liberally to cover ‘all persons who are outside their country of origin for reasons of feared persecution, armed conflict, generalised violence, foreign aggression or other circumstances which have seriously disturbed public order, and who, as a result, require international protection’ in Volker Türk, “The Role of UNHCR in the Development of International Refugee Law,” in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson, and Patrick Twomey, (Cambridge: Cambridge University Press, 1999), 156.

outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>52</sup>

The OAU Refugee Convention in addition to including the Convention definition states:

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>53</sup>

For purposes of this study refugee refers to those persons who have been defined as such through applicable international and domestic law.

*Refugee protection regime.* The current refugee protection regime draws from general human rights principles, treaty and customary law obligations, national and regional jurisprudence and soft law such as the UNHCR’s Executive Committee’s conclusions.<sup>54</sup> The primary actors are States and the UNHCR.

*National human rights institution.* The Office of the High Commissioner for Human Rights (OHCHR) and the Global Alliance of NHRIs (GANHRI) have adopted the view that an NHRI is a “body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.”<sup>55</sup> However, as Reif cautions, it may at times be necessary to look beyond the prevailing NHRI definitions when conducting human rights research by examining all horizontal accountability institutions in the State playing roles in human rights promotion and protection.<sup>56</sup> This would enable one to “get a full picture of a State’s

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<sup>52</sup> UNHCR, *The Convention and Protocol Relating to the Status of Refugees*

<sup>53</sup> ACHPR, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, accessed 20 November 2017, [http://www.achpr.org/files/instruments/refugee-convention/achpr\\_instr\\_conv\\_refug\\_eng.pdf](http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf)

<sup>54</sup> See Jason Ralph and James Souter, “Introduction: The Responsibility to Protect and the Refugee Protection Regime,” *Ethics & International Affairs* 31, no.1 (2017).

<https://www.ethicsandinternationalaffairs.org/2017/introduction-rtop-refugee-protection-regime/>. Also Erika Feller, “International Refugee Protection 50 Years on: The Protection Challenges of the Past Present and Future,” *IRRC* 83: 843 (2001), 582.

<sup>55</sup> UN, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (New York: UN, 1995), 6.

<sup>56</sup> Reif, “Shifting Boundaries of NHRI Definition,” 72.

implementation of and compliance with its international and domestic human rights legal obligations.”<sup>57</sup>

*Refugee rights.* This term is used broadly to include the rights of refugees and asylum seekers under international, regional and domestic law. These rights are distinct from migrants’ rights - as noted by Feller, “refugees are not migrants ... it is dangerous, and detrimental to refugee protection, to confuse the two groups, terminologically or otherwise.”<sup>58</sup>

*Non-refoulement.* This principle prescribes broadly that no refugee or asylum seeker shall be returned in any manner whatsoever to any country where he or she would be at risk of persecution.<sup>59</sup> This principle forms an essential part of international refugee law and human rights protection and is a rule of customary international law.<sup>60</sup>

## 1.7 Main assumptions

The main assumptions that underpin this study include the following:

- 1 That NHRIs were promoting and protecting refugee rights despite the absence of a clear recognition of their role within the international refugee protection regime;
- 2 That the NHRIs with the broadest mandate would play a prominent role in advancing refugee rights;
- 3 That strengthening NHRIs’ capacity to influence positive change for refugee protection at the domestic level would influence State responsibility for refugee protection at the international, regional and domestic levels.

## 1.8 Research methodology

The research methodology employed for this study is discussed in Chapter 5 of this thesis.

This study employed a non-doctrinal legal research method to answer the research questions,

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<sup>57</sup> Reif, 72.

<sup>58</sup> Erika Feller, “Refugees are not Migrants,” *Refugee Survey Quarterly* 25, no.4 (2005): 27–35.

<sup>59</sup> Guy S. Goodwin-Gill, “International Law of Refugee Protection,” 40.

<sup>60</sup> Goodwin-Gill, 40.



which related to NHRIs' methods of operation within the context of refugee protection. This study utilised two research methodological approaches, namely: desk review (secondary data collection) and primary data collection (utilising a qualitative research design). Data from the desk review and primary data was used to determine the extent to which NHRIs in South Africa and Kenya were promoting and protecting refugee rights. The factors considered in the data analysis included: States' international law obligations and the NHRIs' mandates, including compliance with the UN Paris Principles relating to the status of national institutions (Paris Principles).<sup>61</sup> The ethical considerations and the researcher's positionality are presented in chapter 5.

### **1.9 Preliminary literature review: Contextualising NHRIs within the refugee protection regime**

There is paucity of empirical research within the international refugee protection regime on the role of NHRIs. The available literature on international human rights law in general and NHRIs in particular, indicates that very few studies have been done about NHRIs beyond their evolution within the international human rights regime,<sup>62</sup> the bridging role they play between the international human rights standards and their implementation at the domestic level,<sup>63</sup> and assessments of their capacity to fulfil their roles.<sup>64</sup> This dearth of evidence is not

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<sup>61</sup> UN, *Principles relating to the Status of National Institutions* (Paris Principles). <https://www.un.org/ruleoflaw/blog/document/principles-relating-to-the-status-of-national-institutions-paris-principles/>. The accreditation process is done periodically by the international network of NHRIs, the Global Alliance of National Human Rights Institutions (GANHRI) through a Sub-Committee on Accreditation.

<sup>62</sup> Thomas Pegram, "Diffusion across Political Systems: The Global Spread of National Human Rights Institutions," *Human Rights Quarterly*, 32, no.3 (August 2010): 729-760, doi: [10.1353/hrq.2010.0005](https://doi.org/10.1353/hrq.2010.0005); Dongwook Kim, "International Nongovernmental Organizations and the Global Diffusion of National Human Rights Institutions," *International Organization*, 67, Issue 3(July 2013): 505-539, <https://doi.org/10.1017/S0020818313000131>; Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia: University of Pennsylvania Press, 2014); Corina Lacatus, "The design of national human rights institutions: global patterns of institutional diffusion and strength" (PhD thesis, The London School of Economics and Political Science, 2016).

<sup>63</sup> Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' *Human Rights Quarterly* 28 (4), 2006: 904-946; Morten Kjørsum, *National Human Rights Institutions Implementing Human Rights* (The Hague: Martinus Nijhoff Publishers, 2003); ISHR, *Bridging the Gap: NHRIs in the Human Rights Council*, (Geneva: ISHR, 2015); UN, "GA Resolution A/RES/70/163," *UN*, 17 December 2015.

<sup>64</sup> K. Meuwissen, "NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?" *Working Paper No. 154*, (Leuven Centre for Global Governance Studies and Institute for International

surprising given that the traditional international refugee protection regime's key components have been the Refugee Convention and its Protocol on the one hand and States and the UNHCR on the other.<sup>65</sup> Where analysis on domestic refugee regimes exists, hardly any reference is made to NHRIs as components of an effective implementation regime despite the importance given to the oversight role that they play.<sup>66</sup>

Within the African region, NHRIs have determined that the protection of refugee rights was a pertinent area for engagement. In 2007, African NHRIs held a conference on the protection of refugees, internally displaced persons and stateless persons. The conference outcome document, the Kigali Declaration set out concrete steps and identified specific tasks for NHRIs with regards to promoting and protecting refugee rights.<sup>67</sup> There has however, not been any evaluation of the progress that African NHRIs have made to realise these commitments. This is despite a further study having found that migration and human rights was a priority thematic area for a significant number of African NHRIs.<sup>68</sup>

Notwithstanding the afore-mentioned limited empirical evidence, there are strong arguments that support a defined role for NHRIs within the refugee protection regime.

Gorlick and Khan argue that in the absence of a domestic or regional refugee protection

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Law, 2015); International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions*, Geneva: International Council on Human Rights Policy, 2005); International Council on Human Rights Policy, *Performance & Legitimacy: National Human Rights Institutions*, (Geneva: International Council on Human Rights Policy, 2004).

<sup>65</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* 2<sup>nd</sup> edn., (Oxford: Clarendon Paperbacks, 1996)

<sup>66</sup> Willie Ncumisa and Popo Mfubu, "Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa," *African Human Mobility Review*, 2(3) (2016): 544-566. See Khalid Koser, *Reforming the International Protection*, 3. OHCHR, *National Human Rights Institutions*, 20. The establishment of a national human rights institution is considered among one of the strategies that a State should adopt to ensure the effective domestic implementation of human rights. See also <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/implementation>, accessed 28 January 2018. NHRIs role should ideally include promotion of a human rights culture through training, and education in human rights. Such activities are considered of vital importance for the effective implementation of human rights at the domestic level.

<sup>67</sup> Network of African National Human Rights Institutions (NANHRI), *Sixth Conference of African National Human Rights Institutions, Kigali, 8-10 October 2007: Kigali Declaration*. [https://nhri.ohchr.org/EN/Regional/Africa/6thConferenceDocuments/Kigali\\_Declaration\\_Final.pdf](https://nhri.ohchr.org/EN/Regional/Africa/6thConferenceDocuments/Kigali_Declaration_Final.pdf) (accessed 27 January 2018)

<sup>68</sup> NANHRI, *Study on the State of African National Human Rights Institutions*, (Nairobi: NANHRI, 2015), 24-25.

framework NHRIs are important actors in safeguarding refugee rights.<sup>69</sup> The authors examined how the Indian National Human Rights Commission's activities contributed to the protection of particular groups of refugees despite the absence of domestic refugee law and the fact that India is not party to the 1951 Convention.<sup>70</sup> They caution that the success of NHRI interventions and their resultant impact on the protection of refugee rights domestically rely on various intervening factors such as accessibility and caseload. However, they conclude that where an NHRI "enjoys an independence of process and procedure" and has the requisite expertise, that NHRI can play an important role in 'safeguarding and expanding legal protection of refugees.'<sup>71</sup>

Ferris analysed the role of civil society and other human rights actors in resolving protracted refugee situations and argues that NHRIs can have a big impact in resolving such situations.<sup>72</sup> She suggests that NHRIs can monitor places of detention, address *non-refoulement*, access to humanitarian assistance and solutions for protracted refugee situations.<sup>73</sup> Ferris' analysis is similar to Gorlick and Khan's, as her analysis discusses the limitations placed on NHRIs due to the contextual challenges that NHRIs and other actors face when addressing refugee rights.<sup>74</sup> For instance, she raises questions about the UNHCR's dominant role within the refugee protection regime and how this reduces the impact that other actors such as NHRIs can have in promoting and protecting refugee rights.<sup>75</sup> This analysis is important as it provides an overview of NHRIs potential – by citing examples of situations where NHRIs have intervened with respect to refugee rights - but also critiques NHRIs' role by noting that many NHRIs are limited institutionally and may not be fully independent.

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<sup>69</sup> Brian Gorlick and Sumbul Rimi Khan, 'Refugee Protection as Human Rights Protection: International Principles and Practice in India' in *Refuge*, 16(6) 1997, 42.

<sup>70</sup> Gorlick and Khan, "Refugee Protection as Human Rights Protection," 42.

<sup>71</sup> Gorlick and Khan, 42.

<sup>72</sup> Elizabeth Ferris, "Protracted Refugee Situations, Human Rights and Civil Society," in *Protracted Refugee Situations: Political, Human Rights and Security Implications*, edited by Gill Loescher James Milner, Edward Newman, Gary Troeller, (New York: United Nations University Press, 2008), 93.

<sup>73</sup> Elizabeth Ferris, "Protracted Refugee Situations, 93.

<sup>74</sup> Elizabeth Ferris, 90-95.

<sup>75</sup> Ferris, 95-98.

Furthermore, Jones in his critique of the refugee protection regime adopted by the UNHCR in South-East Asia, argues that refugee protection in that region relies less on the normative framework, as few States in the region have signed the 1951 Convention.<sup>76</sup> Instead, he argues that to fill the normative gap, refugee protection in Southeast Asia depends on a negotiated humanitarian protection space which has resulted in the emergence of a ‘law of asylum’ based on human rights instruments and institutions at both national and regional levels.<sup>77</sup> These institutions, which include NHRIs, have filled the legal gap and are now an important means through which refugee rights in the region are being promoted and protected. He concludes that effective strategies for refugee protection require the inclusion of such institutions.

While there is acknowledgement that NHRIs face considerable institutional and contextual challenges, proponents of a redesigned refugee protection regime argue for the increased visibility of actors such as NHRIs. Gorlick in his work considering ways to enhance refugee protection through international human rights law, argues that it is necessary for the refugee protection regime to incorporate a broader approach by improving operational cooperation with actors such as NHRIs.<sup>78</sup> Similarly, Mortem in his analysis of the influence that human rights organisations have had on the creation of refugee regimes, suggests the need to create a bottom-up approach, which would encourage national actors such as NHRIs to actively feed into the international level by increasing collaboration between the two levels of protection.<sup>79</sup> In addition, Raustiala and Slaughter suggest that some of the most effective human rights regimes are those with links between international institutions and domestic

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<sup>76</sup> Martin Jones, “Moving Beyond the Protection Space: Developing a Law of Asylum in South-East Asia,” in *Refugee Protection and the Role of Law: Conflicting Identities*, ed. Susan Kneebone, Dallal Stevens and Loretta Baldassar (New York: Routledge, 2014), 251-270.

<sup>77</sup> Martin Jones, “Moving Beyond the Protection Space,” 251-270.

<sup>78</sup> Brian Gorlick, “Human Rights and Refugees,” 23.

<sup>79</sup> Kjærø Mortem, 2002, “Human Rights Organisations and the Formation of Refugee Regimes,” in *Global Challenges in Asylum Regimes*, edited by Daniele Joly (New York: Palgrave Macmillan, 2002), 204-214.

actors.<sup>80</sup> This finding is important as NHRIs are seen as a link between the domestic and the international human rights levels.<sup>81</sup>

Within the general human rights discourse, support for institutions such as NHRIs find expression in works of several authors. Jhabvala's analysis on the challenges of implementing human rights treaties argues: "one of the fundamental tenets of the international protection of human rights is that they should be implemented domestically through local institutions."<sup>82</sup> Similarly, Simmons asserts: "domestic supervision [of human rights] is of far greater and more enduring significance for the promotion and protection of human rights than external machinery."<sup>83</sup>

Given the focus of this study, it is important to review some of the key literature available on NHRIs. As indicated above, the body of knowledge on NHRIs is wide and growing. However, this is limited in the context of this study but still significant in creating an understanding of NHRIs, especially the extent to which they can influence the diffusion of human rights norms at the domestic level. For instance, Cardenas provides a comprehensive overview of NHRIs across the globe including reasons for their creation, their institutional structures, the role that they play as agents for accountability for human rights and the benchmark to assess their effectiveness or lack thereof.<sup>84</sup> Goodman and Pegram's edited collection of essays on NHRIs, offers insights on NHRIs' influence on State compliance with international human rights norms and how such compliance brings about social change.<sup>85</sup>

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<sup>80</sup> Kal Raustiala and Anne-Marie Slaughter, "International law, International Relations and Compliance," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse and Beth A. Simmons (London: SAGE Publications Ltd, 2002), 547-548.

<sup>81</sup> OHCHR, *National Human Rights Institutions*, 13.

<sup>82</sup> Farrokh Jhabvala, "on Human Rights and the Socio-Economic Context," *Netherlands International Law Review* (1984): 176 in Cole, "Condition Coupling," 4.

<sup>83</sup> Beth A. Simmons and Daniel J. Hopkins, "The Constraining Power of International Treaties: Theories and Methods," *American Political Science Review* 99 (2005): 623-31.

<sup>84</sup> Sonia Cardenas, *Chains of Justice*, 3-4.

<sup>85</sup> Goodman and Pegram, eds. *Human Rights, State Compliance*.

There is consensus among the authors of this collection about NHRIs' overall importance in the promotion and protection of human rights.<sup>86</sup>

In his chapter, Meyer argues that to determine the effectiveness of NHRIs requires a close look at the relationship that the NHRI has with other actors including those at the grassroots and those that are transnational or supranational.<sup>87</sup> Further, the concluding assertion is that to effectively evaluate an NHRI's performance or impact requires the use of a multi-dimensional approach.<sup>88</sup> Such an approach requires a study of "the top-down and bottom-up engagements on the international level as well as both vertical impact on rights holders and civil society and horizontal engagement and impact with other government institutions on the domestic level."<sup>89</sup> These conclusions are useful for the development of the research methodology for this study. In addition, this body of work posits that the contribution that NHRIs make, no matter how small, is an indication that NHRIs are assisting in the entrenchment of global human rights standards.<sup>90</sup>

Murray also provides an in-depth analysis of the experiences of African NHRIs within the international and regional human rights systems.<sup>91</sup> While significant developments about the formal recognition of NHRIs within UN processes have occurred since her work was published,<sup>92</sup> her study identifies important areas of concern for NHRIs. These include the development of a rigorous process for assessing an NHRI's independence; a concise understanding of the specific role that NHRIs play and their responsibility as actors at the

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<sup>86</sup> Kasey L. McAll-Smith, "Book Review: Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, Cambridge, 2012) xii + 351pp, *Human Rights Law Review* 13 (2013): 603-619. doi:10.1093/hrlr/ngtO22.

<sup>87</sup> David S. Meyer, "National Human Rights Institutions, Opportunities, and Activism," in Ryan Goodman and Thomas Pegram eds. *Human Rights, State Compliance, and Social Change, Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012), 328.

<sup>88</sup> Kasey L. McAll-Smith, Book Review: Ryan Goodman, 619.

<sup>89</sup> McAll-Smith, Book Review: Ryan Goodman, 619.

<sup>90</sup> McAll-Smith, 619.

<sup>91</sup> Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*. (Oxford: Hart Publishing, 2007), 90-91.

<sup>92</sup> UN General Assembly, National institutions for the promotion and protection of human rights, Resolution A/Res/70/163 accessed 05 April, 2017, <https://nhri.ohchr.org/EN/IHRS/UNNY/Pages/Main.aspx>

international level; and developing a clear system for accountability of NHRIs.<sup>93</sup> An evaluation conducted in 2015 of the Office of the High Commissioner for Human Rights' (OHCHR) support to NHRIs, identified some of these areas that Murray has pointed out as those that still require urgent attention to ensure NHRIs' effectiveness as human rights actors.<sup>94</sup> While Murray's study does not address the specific role that NHRIs can play in advancing refugee rights, it provides important insights on the potential that NHRIs have to influence both the international and regional processes that relate to human rights generally and refugee rights in particular, on the condition that the areas of concern are sufficiently addressed.

Steinerte in her contribution to an analysis of regional approaches to the protection of asylum seekers focuses on the activities of African NHRIs which range from influencing legislation, shaping refugee and asylum policy, strategic litigation, and monitoring places of detention.<sup>95</sup> She highlights that developments at the international level may provide concise opportunities for NHRIs to engage comprehensively with the promotion and protection of refugees and asylum seekers.<sup>96</sup> She argues that the coming into force of the Optional Protocol to the Convention Against Torture (OPCAT), which requires the creation of a national preventive mechanism (NPM) in line with the Paris Principles, is an opportunity that NHRIs can exploit to strengthen their role in safeguarding refugee rights.<sup>97</sup> She suggests that Article 4 of the OPCAT provides a very broad definition of the term "place of deprivation of liberty" which States are required to allow the national preventive mechanism access to.<sup>98</sup> As such this broad definition would allow NHRIs, should they have this monitoring mandate, to visit

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93. Murray, *Role of NHRIs*, 91.

94. Francesca Jessup and Koffie Kounte, *Evaluation of OHCHR Support to NHRIs*, accessed 27 January 2018, <http://www.ohchr.org/Documents/AboutUs/Evaluation/NHRI.pdf>

95. Elina Steinerte, "African National Human Rights Institutions and the Protection of Asylum Seekers: Existing Practices and Opportunities through the Optional Protocol to the UN Convention against Torture" in *Regional Approaches to the Protection of Asylum Seekers: International Legal Perspectives*, eds. Ademola Abass and Francesca Ippolito (London: Routledge, 2016), 88.

96. Elina Steinerte, "African National Human Rights Institutions," 88.

97. Steinerte, 103.

98. Steinerte, 103.

places where refugees and migrants may be detained - such as airports, refugee camps and immigration detention facilities.<sup>99</sup>

She further suggests that since the national preventive mechanism mandate prescribed by the OPCAT has a wide scope, it provides the designated entity with the potential to make significant contributions to promoting and protecting refugee rights in places where they are deprived of their liberty.<sup>100</sup> This is particularly important given the widespread practice of detaining refugees and asylum seekers.<sup>101</sup> Noteworthy is that many African NHRIs, even where no explicit provision exists in their mandate, have engaged in activities related to the prevention of torture and have developed tools and guidelines to support these efforts.<sup>102</sup>

Another argument to consider when situating NHRIs within the refugee protection regime is the interaction between refugee law and human rights law and its implications for NHRIs. Scholarship and practice acknowledges this interaction and as Chetail notes, it is important to assess this relationship in order to determine the full range of States' obligations and thus inform their practice towards refugees and asylum seekers.<sup>103</sup> This thesis does not attempt to elucidate in detail the convergence between these two fields of international law nor consider arguments about which branch of law is complementary or secondary to the

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99. Steinerte, 103.

100. Steinerte, 104; Article 19 of the OPCAT states:

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

101. Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. (Geneva: UNHCR, 2011)

102. For example: OHCHR, Asia Pacific Forum (APF) and Association for the Prevention of Torture (APT), *Preventing Torture: An Operational Guide for National Human Rights Institutions* (Geneva: OHCHR and APF, 2010); APT, "The Role of National Human Rights Institutions in the Prevention of Torture and Cruel, Inhuman and Degrading Treatment or Punishment," accessed 28 January 2018, [https://www.apf.ch/content/files\\_res/nhri-position-paper.pdf](https://www.apf.ch/content/files_res/nhri-position-paper.pdf); NANHRI, *Preventing Torture in Africa: Lessons and Experiences from National Human Rights Institutions* accessed 28 January 2018, <http://www.nanhri.org/tag/association-for-the-prevention-of-torture-apt/>.

<sup>103</sup> Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law," in *Human Rights and Immigration*, ed. Ruth Rubio-Marín (Oxford: Oxford University Press, 2014), 19-72.



other.<sup>104</sup> Rather, this is discussed with respect to the interpretation of NHRIs' mandates and is pertinent in the discussions of categories of persons in need of protection as defined in Article 1 (A)(2) of the 1951 Refugee Convention, in particular in the interpretation of the term "membership of a social group."<sup>105</sup>

With respect to NHRIs, they have evolved distinctly within the international human rights regime and are thus viewed through a traditional human rights lens, to the exclusion of refugee law or rights. As discussed in this chapter, NHRIs have recently begun being considered as critical actors, separate and distinct from NGOs and other civil society actors, with respect to the promotion and protection of human rights in general. They remain at the periphery of the refugee protection regime. However, the expansion of the understanding of refugee rights to include those derived from human rights instruments provides a basis for NHRIs to interpret their human rights mandates to include refugee rights and even broadly, migrants' rights. Indeed, evidence from NHRI practice indicates that NHRIs across the globe are promoting and protecting migrants' rights primarily through interpretation of their mandates broadly to encompass rights of all persons within a given State's territory.<sup>106</sup>

However, evidence also indicates that the focus is broad with few having systems in place to address refugee rights as distinct from other categories of migrants' rights.<sup>107</sup> This is perhaps reflective of the limited or the lack of specialist expertise on forced migration or refugee law within NHRI structures. This apparent or perceived lack of specialist expertise in refugee law is a challenge especially in the current refugee response context where there is a push within the political discourse, to view forced migration in terms of "regular" and "irregular" movement, which diminishes the fundamental notion of fear of persecution as a

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<sup>104</sup> See Vincent Chetail above

<sup>105</sup> These are race, religion, nationality, membership of particular social group, and political opinion.

<sup>106</sup> Andrea Kämpf, *National Human Rights Institutions and their Work on Migrants: Results from a Survey among NHRIs* (Berlin: German Institute for Human Rights, 2016) 25.

<sup>107</sup> Andrea Kämpf, *NHRIs and their Work on Migrants*, 27-30

reason for flight. This in turn results in the reluctance of States addressing protection needs that may arise among forcibly displaced groups classified as “irregular” migrants.<sup>108</sup>

The second aspect of the discussion on the nexus between refugee law and human rights law and its implications for NHRIs is, as noted earlier, with respect to the grounds for persecution contained within the refugee definition. In terms of the refugee definition, the 1951 Refugee Convention does not ascribe meaning to the content of the term “membership of a particular social group.”<sup>109</sup> However, human rights law has influenced the development of the term to include gender and sexual orientation as encapsulating membership of a particular social group and therefore grounds for a refugee status claim.<sup>110</sup> Furthermore, States have applied human rights norms to determine that certain forms of violence against

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<sup>108</sup> The use of terms irregular vs regular reinforces the notions of securitisation of asylum and focuses attention on border security. See Juan M. Amaya-Castro, “International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis,” *Netherlands Yearbook of International Law* 44 (December 2013): 65-88, [https://doi.org/10.1007/978-94-6265-011-4\\_4](https://doi.org/10.1007/978-94-6265-011-4_4); Alexander Betts, “Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants,” *International Journal of Refugee Law* 22, no. 2 (2010): 209-236, <https://doi.org/10.1093/ijrl/eeq018>.

<sup>109</sup> Neither does the 1951 Refugee Convention define the term persecution. The meaning of persecution derives from human rights law. Hathaway defines it as “sustained or systemic violation of basic human rights demonstrative of a failure of state protection” James C Hathaway, *The Law of Refugee Status*, 104-105.

<sup>110</sup> Chetail, 27-28. There is a large body of literature on gender-related asylum law. See for instance Heaven Crawley, *Refugees and Gender: Law and Process*, Bristol: Jordon Publishing Ltd, 2001; Kristen Walker, “The Importance of Being Out: Sexuality and Refugee Status,” *Sydney Law Review* (1996): 5668-597 <http://www.austlii.edu.au/au/journals/SydLawRw/1996/32.pdf>; Deborah E. Anker, “Refugee Law, Gender, and the Human Rights Paradigm,” *Harvard Human Rights Journal* 15 (2002): 133-154, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:11357476>; Siobahn Mullaly, “Gender Asylum Law: Providing Transformative Remedies?” in *Contemporary Issues in Refugee Law* eds. Satvinder Singh Juss and Colin Harvey, (Gloucestershire: Edward Elgar Publishing Ltd: 2013): 196-224 DOI: <https://doi-org.ezproxy.uct.ac.za/10.4337/9781782547662>; UNHCR, “UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender: Using international law to support claims from women seeking protection in the U.S.”; Elena Fiddian-Qasmiyeh, “Gender and Forced Migration,” in *The Oxford Handbook of Refugee and Forced Migration Studies* eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (Oxford: Oxford University Press, 2014): 395-408; UNHCR, “Asylum Lawyers Project,” *UNHCR*, November 2016, <https://www.unhcr.org/en-us/5822266c4.pdf> (accessed 2 June 2020); UNHCR, “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 7 May 2002, *UNHCR* <https://www.unhcr.org/3d58ddef4.pdf> (accessed 5 June 2020); Mary Kapron and Nicole LaViolette, *Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography* (Ottawa: University of Ottawa, 2014) <https://www.oramrefugee.org/wp-content/uploads/2016/05/SOGI-Refugees-Annotated-Bibliography.pdf> (accessed 5 June 2020); Nicole LaViolette, “UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary,” *International Journal of Refugee Law* 22.2 (2010): 173-208, <https://doi.org/10.1093/ijrl/eeq019>; Alice Edwards, “Overview on International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning,” Presentation to the Canadian Council for Refugees, 26 July 2006 (Amnesty International Index: POL 33/004/2006).

women such as rape, other forms of sexual violence and female genital mutilation constitute serious harm within the scope of persecution.<sup>111</sup>

For NHRIs, especially those with a specialised mandate to promote and protect gender equality, this evolution of international refugee law to include a gendered view of the refugee experience and the persecutions that may arise on the basis of gender, provides a strong basis to advance the rights of refugee and asylum seeking women, girls and sexual minorities within the asylum process. Such efforts require an understanding of the intersectionality between the refugee/asylum status and other forms of vulnerability that particularly face refugees and asylum-seeking women, girls and sexual minorities.

Kimberlé Crenshaw first proposed intersectionality as a theory to explore and explain the overlapping experiences of oppression and discrimination faced by African American women by virtue of their race and gender in a society characterised by every day, institutionalised racism and patriarchy.<sup>112</sup> The theory is defined as “the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.”<sup>113</sup> Thus, as Clare describes it: “Gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; sexual orientation folds on top of race (...) everything finally piling into a single human body.”<sup>114</sup>

The intersectionality theory has transcended its critical race theory roots and has been

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<sup>111</sup> Deborah E. Anker, “Refugee Law, Gender...” 138-149

<sup>112</sup> Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum* Volume 8, Issue 1 (1989): 139-167 <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>; Kimberlé Williams Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,” *Stanford Law Review* 43 (1991): 1241-1299.

<sup>113</sup> Oxford English Dictionary, “Intersectionality,” 2015

<sup>114</sup> Eli Clare, *Exile and Pride: Disability, Queerness and Pride*, (Durham: Duke University Press, 2015) cited in Ben Smith, “Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective,” *The Equal Rights Review*, 16 (2016): 73.

developed, adopted or adapted by other academic disciplines and discourses.<sup>115</sup> It has also faced criticism including that it falls short of being a fully elaborated theory and that it fails to define its scope and reach.<sup>116</sup> While it is important to note that as with all theories it has its strengths and shortcomings, a critical review of the challenges of its theoretical or empirical utilisation is beyond the scope of this thesis. Its importance in the context of this thesis is that it has since travelled beyond its initial theoretical premise and has found application in international human rights law and refugee law, in particular, in relation to women's human rights, the rights of sexual minorities and marginalised groups.<sup>117</sup>

Within the refugee discourse, Fiddian-Qasmiyeh describes intersectionality as:

The recognition that experiences of displacement are framed by a range of intersecting and overlapping identity markers [or categories] (including gender, ethnicity, religion, sexual orientation, and age), and also by a range of power structures (such as patriarchy, xenophobia, islamophobia, and homophobia). Importantly, the relative significance of these identity markers and related power structures shift across time and space, including in processes of displacement. This can help us understand –perhaps even predict –that individuals and social groups may be vulnerable to, or at risk of, different forms of violence [marginalisation and

<sup>115</sup> Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis in *Signs: Intersectionality: Theorizing Power, Empowering Theory* 38, no. 4, (Summer 2013): 785-810, <https://www.jstor.org/stable/10.1086/669608>; Devon W. Carbado, Kimberlé Williams Crenshaw, Vickie M. Mays, and Barbara Tomlinson, "Intersectionality: Mapping the Movements of a Theory," *Du Bois Review* 10, no.2 (2013): 303-312, <https://doi.org/10.1017/S1742058X13000349>

<sup>116</sup> Jennifer C Nash, "Rethinking Intersectionality" *Feminist Review* 89, no.1 (2008): 8, <https://doi.org/10.1057/fr.2008.4>; Leslie McCall, "The Complexity of Intersectionality," *Signs Journal of Women in Culture and Society* 30, no. 3 (2005): 1771–1800, DOI: [10.1086/426800](https://doi.org/10.1086/426800).

<sup>117</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, available at: <https://www.refworld.org/docid/4d467ea72.html> [accessed 10 June 2020] ('CEDAW, General Recommendation No 28') at para 18. In its General Comment No 28, CEDAW acknowledged intersectionality as a "basic concept for understanding the scope of the general obligations of States Parties to the Convention"; Amanda Barbara Allen Dale, "Intersectional Human Rights at CEDAW: Promises, Transmissions and Impacts," (PhD Thesis, York University, 2018); Davis, Aisha Nicole, "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage," *Harvard Human Rights Journal* Vol. 28 (2015): 205-242; Serisha Iyar, *The Most Vulnerable: An Intersectional Approach to Refugee Policymaking and Advocacy Efforts*, (Ottawa: Citizens for Public Justice, 2019), <https://cpj.ca/wp-content/uploads/The-Most-Vulnerable-Report-by-Serisha-Iyar.pdf>; Simona Zavrtnik, Sanja Cukut Krilić. "Addressing Intersectional Vulnerabilities in Contemporary Refugee Movements in Europe." *Družboslovne Razprave*, XXXIV (2018): 85 – 106; Linda Bartolomei, Eileen Pittaway and Emma Elizabeth Pittaway, "Who Am I? Identity and Citizenship in Kakuma Refugee Camp in Northern Kenya." *Development* 46, (2003): 87–93, <https://doi.org/10.1177/10116370030463014>; Joakim Ander Rimmer Lomelin Osuna Pedersen, "Human Rights of Refugees in Uganda: the CRRF Norm Translated In ReHOPE," (Master Thesis, Aalborg University, 2018). [https://projekter.aau.dk/projekter/en/studentthesis/human-rights-of-refugees-in-uganda-the-crrf-norm-translated-into-rehope\(47db4c80-8fe4-4c79-9b72-442ad2af2cbd\).html](https://projekter.aau.dk/projekter/en/studentthesis/human-rights-of-refugees-in-uganda-the-crrf-norm-translated-into-rehope(47db4c80-8fe4-4c79-9b72-442ad2af2cbd).html); Gauthier de Beco, "Protecting the Invisible: An Intersectional Approach to International Human Rights Law," *Human Rights Law Review* 17, 2017: 633–663, doi: 10.1093/hrlr/ngx029.

exclusion] throughout different stages of their journeys to secure international protection.<sup>118</sup>

Ultimately, intersectionality is principally concerned with how people experience their belonging to these categories and the related oppression or empowerment that may result.<sup>119</sup> As such, research within the intersectionality framework is often used as a means of giving a voice to oppressed or invisible groups.<sup>120</sup> While there is still a gap in research on the application of intersectionality in the field of human rights,<sup>121</sup> its use provides promise for NHRIs in their quest to develop strategic approaches to address systemic human rights violations, which often arise in the context of refugee rights.

Thus, for NHRIs, the intersectionality theory provides an additional lens to comprehensively analyse the situation of refugees and asylum seekers, in particular women, girls, sexual minorities, persons with disability, and the elderly. This would then serve to better inform promotion and protection activities with respect to these categories of refugees and asylum seekers. The implications of the convergence between international human rights law and international refugee law will be discussed further in chapter 3 and will also be utilised in the analysis of the NHRIs' activities in chapters 6 and 7.

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<sup>118</sup> Elena Fiddian-Qasmiyeh, "Presentation to the UNHCR High Commissioner's Dialogue on Protection Challenges Panel 1, Session 1 on Reception and Admission," 2017 UNHCR High Commissioner's Dialogue, Geneva, 12-13 December 2017.

Other scholars who have utilised the intersectionality theory to explain the experiences of refugee women and sexual minorities include: Peter Margulies, "Asylum, Intersectionality, and AIDS: Women With HIV as a Persecuted Social Group," *Georgetown Immigration Law Journal* Vol. 8, (Fall, 1994): 521-555; Marianne Vervliet, Jan De Mol, Eric Broekaert, and Ilse Derluyn, "'That I Live, that's Because of Her': Intersectionality as a Framework for Unaccompanied Refugee Mothers," *British Journal of Social Work* Vol. 44 (2014): 2023–2041 doi:10.1093/bjsw/bct060.

<sup>119</sup> Nira Yuval-Davis (2011) *The Politics of Belonging: Intersectional Considerations* (London, SAGE Publications Ltd: 2011) cited in Marianne Vervliet, Jan De Mol, Eric Broekaert and Ilse Derluyn, "That I Live, that's Because of Her..." 2025

<sup>120</sup> Leslie McCall, "The Complexity of Intersectionality," 1771-1800.

<sup>121</sup> Gauthier de Beco, "Protecting the Invisible," 633; Oxford Human Rights Hub, "Intersectionality and Human Rights Workshop," 10<sup>th</sup> September 2018, accessed 10 June, 2020, <https://ohrh.law.ox.ac.uk/intersectionality-and-human-rights-workshop/>.

### 1.10 Thesis outline

This thesis comprises eight chapters. Its layout follows the general humanities and social sciences format for the structure of a thesis, that is, the introduction, the literature review, the methodology, the presentation, and discussion of the findings and then the conclusion.<sup>122</sup> The thesis presents findings from South Africa and Kenya as discrete findings and not as a comparative study of NHRIs in these countries. The first chapter introduces the problem statement and presents the argument for a defined role for national human rights institutions within the refugee protection regime at the international, regional and domestic levels. It locates national human rights institutions within the argument for reforming the refugee protection regime and highlights their important role as agents for diffusion of human rights norms and standards at the domestic level. This chapter also elaborates on the purpose, scope and significance of the study as well as presents the aims, objectives and research questions of the study. In addition, it describes the research methodology employed for this study. Chapters two, three and four are based on the desk review.

Chapter two critically reviews and discusses the theoretical and normative frameworks that underpin the evolution of NHRIs. It highlights the role that NHRIs as domestic actors can influence State compliance with human rights norms and standards and how such influence, can in turn, contribute to compliance with refugee law, norms and standards.

Chapter three examines the international refugee protection regime, State responsibility and legally binding obligations. It discusses the normative and implementation gaps and identifies NHRIs' as a bridging mechanism. This provides the contextual

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<sup>122</sup> See for instance Gina Wisker, *The Postgraduate Research Handbook: Succeed with Your MA, MPhil, EdD and PhD* (London: Red Globe Press, 2008), 281-282.

background for discussion of their potential for demanding State accountability and advancing refugee rights.

Chapter four provides an overview of the NHRIs in South Africa and Kenya. It considers their establishment and functioning, highlights their role within the respective domestic refugee protection regimes. This chapter also provides an overview of the respective domestic refugee protection regimes and identifies the challenges faced that impact on the realisation of refugee rights.

Chapter five discusses the research methodology employed for this study. It provides the background for the discussion of the findings, which follows in chapter six and seven. Thus, chapter six discusses the findings with respect to the South African NHRIs and chapter seven discusses the findings in relation to the Kenyan NHRIs. Chapter eight presents specific conclusions that answer this study's questions. Recommendations for further research are also proposed in this chapter.

## **1.11 Conclusion**

This chapter has provided the context for this study. It has presented the arguments for reforming the international refugee protection regime to include defining a clear role for domestic actors including national human rights institutions within the protection regime. It has identified some of the key normative and implementation gaps within international refugee protection regime, including the need to view refugee rights as integral components of the human rights regime, to situate the argument for a heightened role for NHRIs within this regime. Furthermore, it has discussed the arguments that support a defined role for NHRIs within the human rights protection regime and the extent to which national human rights institutions can influence the diffusion of human rights norms at the domestic level. It provided the aims and objectives of this study and the questions that this study answers, to

support the argument for a defined role for national human rights institutions within the refugee protection regime.



## Chapter 2

### The Evolution of National Human Rights Institutions

#### 2.1 Introduction

National human rights institutions have evolved rapidly within the international human rights system. Their rapid spread has generated interest in understanding their existence and their effectiveness as human rights actors. This chapter will critically review and discuss, the normative and theoretical frameworks that underpin the evolution of national human rights institutions. The first section discusses the definition of a national human rights institution. This provides an understanding of their nature and uniqueness as human rights actors. It then describes the overview of their historical evolution within the international human rights system. This is followed by a discussion on the Paris Principles as the normative framework that governs national human rights institutions. The chapter then presents the argument that norm-based theories provide a plausible avenue for explaining the spread, and possible impact of national human rights institutions. It argues that the socialisation theory is the possible theoretical framework for understanding national human rights institutions' evolution and influence on compliance with human rights norms.

#### 2.2 Defining a national human rights institution

A national human rights institution is a specific type of institution created to promote and protect human rights domestically.<sup>1</sup> Although government-funded, national human rights institutions are required to function independently.<sup>2</sup> They are often described as a bridge between international human rights obligations and domestic implementation.<sup>3</sup> This is because national human rights institutions are in principle designed to oversee a State's

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<sup>1</sup> OHCHR, *National Human Rights Institutions*, 13.

<sup>2</sup> OHCHR, 13.

<sup>3</sup> Ryan Goodman and Thomas Pegram, National Human Rights Institutions, State Conformity and Social Change in *Human Rights, State Conformity and Social Change: Assessing National Human Rights Institutions*, eds. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, 2012), 12.

compliance with its human rights obligations. Scholarly debate around the exact definition of national human rights institution abounds.<sup>4</sup> However, there is neither a singular definition of a national human rights institution nor is there a standard prescription of what form and structure such institutions should take.<sup>5</sup> This lacuna stems largely from the absence of a definition of an NHRI in the UN Paris Principles relating to the status of national institutions (Paris Principles), which provide the normative framework for establishing an NHRI.

The widely used definition of NHRIs is one that has been adopted by the OHCHR and the Global Alliance of National Human Rights Institutions (GANHRI), the representative body of NHRIs at the international level. Their suggested definition of an NHRI is “a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.”<sup>6</sup> Subsequent OHCHR and GANHRI practice, has led to the understanding that NHRIs are those institutions that have the broadest human rights mandate and are accredited with an A status.<sup>7</sup> Alternative definitions include “a quasi-governmental or statutory institution with human rights in its mandate”<sup>8</sup> or as suggested by Cardenas that an NHRI is “an administrative body responsible for protecting and promoting human rights domestically.”<sup>9</sup>

Where there is a multiplicity of NHRIs within one State, the GANHRI has historically promoted the establishment and accreditation of a single NHRI, favouring the NHRI with the

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<sup>4</sup> Linda Reif, “The Shifting Boundaries of NHRI definition in the International System,” in *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* eds. Ryan Goodman and Thomas Pegram (Cambridge University Press 2012), 52-73.

<sup>5</sup> OHCHR, National Human Rights Institutions, 13.

<sup>6</sup> UN Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4 at para. 39, UN Doc. HR/P/PT/4, UN Sales No. E.95.XIV.2 (1995).

<sup>7</sup> Through the GANHRI accreditation process.

<sup>8</sup> International Council on Human Rights Policy (ICHRP), *Performance and Legitimacy: National Human Rights Institutions 2<sup>nd</sup> edition* 2004, Versoix: ICHRP, 3.

<sup>9</sup> Sonia Cardenas, *Chains of Justice*, 7.

broadest human rights mandate.<sup>10</sup> In its General Observations adopted in May 2013, the GANHRI Sub-Committee on Accreditation acknowledged and encouraged “the trend towards a strong national human rights protection system in a State, by having one consolidated and comprehensive national human rights institution.”<sup>11</sup> As a result, States such as the United Kingdom, which has three NHRIs accredited with the A status, remain the exception rather than the norm.<sup>12</sup>

Reif, however, cautions against employing only a conservative definition of an NHRI.<sup>13</sup> Some States have other national-level thematic human rights institutions involved in human rights promotion and protection such as equality bodies and children’s rights commissioners. These institutions can also influence human rights outcomes, and need to be considered when conducting research on human rights especially within the domestic context.<sup>14</sup> This study considers this. While both South Africa and Kenya have established national human rights institutions that are designated A-status (fully compliant with the Paris Principles), due regard is given to other State institutions with a human rights mandate - in so far as their work relates to the promotion and protection of refugee rights.

### **2.3 Historical overview of the evolution of NHRIs**

Pohjolainen correlates the development of NHRIs within the international human rights law discourse with the gradual strengthening of the international human rights regime.<sup>15</sup> She provides a detailed account of the evolution of NHRIs in three phases: introduction of the idea (1946-1978), popularization of the concept of NHRIs (1978-1990) and expansion of

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<sup>10</sup> GANHRI, “General Observation 6.6.”

<sup>11</sup> GANHRI, “General Observation 6.6.”

<sup>12</sup> These are the Equality and Human Rights Commission of England and Wales, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission.

<sup>13</sup> Linda C. Reif, “The Shifting Boundaries of NHRI 53.

<sup>14</sup> Linda C. Reif, “Book Review: Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014), 482.” *Human Rights Law Review* 15, Issue 1, (1 March 2015): 185–190, <https://doi.org/10.1093/hrlr/ngu039>.

<sup>15</sup> Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions*, 30-117.

NHRIs (from 1990 onwards).<sup>16</sup> These phases were influenced by the adoption of three key UN resolutions. In 1962, the UN Commission on Human Rights adopted a resolution that recommended the establishment of national human rights bodies by States.<sup>17</sup> These institutions would take the form of a national advisory body or local committees tasked with addressing human rights concerns.<sup>18</sup> They would examine the human rights situation within their respective States, offer advice to the government, and promote a culture of human rights.<sup>19</sup> This resolution built on the UN Economic and Social Council's 1946 resolution, which encouraged States to establish local human rights committees to promote human rights norms.<sup>20</sup> At that time, however, there was reluctance among the Member States to establish such institutions as many considered such matters domestic and at the States' discretion.<sup>21</sup>

In 1978, the UN Commission on Human Rights adopted a resolution on "national institutions in the field of human rights."<sup>22</sup> Its objective was to "provide a guideline for the structure and function of national institutions for the protection of human rights."<sup>23</sup> Following the resolution's adoption, the UN held the first seminar on national institutions where Member States discussed the guidelines and shared information on existing national institutions, such as anti-discrimination commissions and ombudsman offices.<sup>24</sup> This was the first gathering that used the term "national human rights institutions" and standardized the dual NHRI functions of promotion and protection.<sup>25</sup> In the subsequent decade, following the

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<sup>16</sup> Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions*, 30-117; See Also Sonia Cardenas, *Chains of Justice*.

<sup>17</sup> Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions*, 36.

<sup>18</sup> Pohjola, 36.

<sup>19</sup> Pohjola, 35-37.

<sup>20</sup> UN ECOSOC, ECOSOC Resolution 9 (II), 21 June 1946.

<sup>21</sup> Sonia Cardenas, *Chains of Justice*, 28.

<sup>22</sup> UN Commission on Human Rights, *Resolution on National Institutions in the Field of Human Rights; Annex: Some possible functions which could be performed by national institutions in the field of human rights, if so decided by the Government concerned*, CHR Res. 23(XXXIV) of 1978 (Mar.8, 1978). See also, G.A. Res. 46, 83, UN GAOR, 33<sup>rd</sup> Sess., UN Doc. A/RES/33/46 (1978)

<sup>23</sup> Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions*, 36.

<sup>24</sup> Sonia Cardenas, *Chains of Justice*, 39. The meeting was entitled, "Seminar on National and Local Institutions for the Promotion and Protection of Human Rights."

<sup>25</sup> Sonia Cardenas, *Chains of Justice*, 39.

adoption of the 1978 resolution, the United Nations prepared a series of reports on the viability of national institutions as mechanisms for the promotion and protection of human rights.<sup>26</sup>

The findings from these reports provided the basis for the 1991 “UN International Workshop on National Institutions for the Promotion and Protection of Human Rights,” held in Paris.<sup>27</sup> This workshop led to the drafting of guiding principles on national institutions for the promotion and protection of human rights.<sup>28</sup> These were eventually adopted and endorsed by the UN as the “Paris Principles” in 1993.<sup>29</sup> Thus, the 1990s proved seminal for NHRIs. The idea of setting up NHRIs as an essential component of the domestic human rights system became widely accepted. There was, however, no formal agreement on the definition of an NHRI or a standard model for the design of such institutions. As a result, States had and continue to have considerable autonomy to determine which institutional design best suits their particular context. This means that NHRIs vary significantly in design, role and operation across different States.<sup>30</sup> This divergence in form and function also has implications for the potential and nature of their influence on human rights compliance. This is discussed below.

NHRIs can be grouped into four broad categories or types: ombudsman, human rights commissions, human rights research institutes, and the hybrid institutions.<sup>31</sup> The roots of the modern NHRI in terms of structure and mandate can be traced back to the classical ombudsman and the early commissions of inquiry.<sup>32</sup> The classical ombudsman emerged in

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<sup>26</sup> LegislationOnline, *UN Standards on NHRIs*, accessed 28 February 2018, <http://www.legislationline.org/topics/organisation/2/topic/82>

<sup>27</sup> GANHRI, “25<sup>th</sup> Anniversary of the Paris Principles,” accessed 9 February 2018, <https://nhri.ohchr.org/EN/Pages/25thAnniversary.aspx>.

<sup>28</sup> GANHRI, “25<sup>th</sup> Anniversary of the Paris Principles.

<sup>29</sup> UN, “*Paris Principles*,”

<sup>30</sup> Gauthier De Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions*. (Cambridge: Cambridge University Press 2015), 5-6.

<sup>31</sup> Thomas Pegram, “Diffusion across Political Systems,” 732-737.

<sup>32</sup> International Council on Human Rights Policy, *Performance and Legitimacy*, 92.

Sweden in 1809 and centred on a single individual elected by Parliament.<sup>33</sup> The Ombudsman was empowered to investigate and if necessary, prosecute grievances relating to legality and administrative fairness lodged against the government.<sup>34</sup> A constitutional revision in 1974 resulted in the inclusion of a human rights mandate within the Swedish Ombudsman's functions<sup>35</sup> Similarly across Europe, existing classical ombudsman institutions in Denmark, Finland, Norway and the Netherlands have had their mandates broadened to include human rights.<sup>36</sup> The modern variant of this model is the human rights ombudsman or hybrid model.

In Latin America and Central and Eastern Europe, rather than having a multiplicity of institutions within a single jurisdiction, States tend to establish the so-called hybrid NHRI model.<sup>37</sup> This model incorporates elements of both the ombudsman and human rights commission. These institutions undertake two roles: "to promote and protect human rights" and "to monitor government administration."<sup>38</sup> Its structure and composition usually resembles the classical ombudsman model.<sup>39</sup> This institution usually has an express human rights mandate, an oversight over administrative fairness, and a legality function.<sup>40</sup> It may also have jurisdiction over corruption and electoral monitoring.<sup>41</sup> Such institutions also engage in other activities such as research and documentation, may perform an advisory function and conduct educational activities.<sup>42</sup> The common powers include investigation and court-referral with others having prosecutorial authority and jurisdiction over private entities.<sup>43</sup>

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<sup>33</sup> *The Parliamentary Ombudsman, Sweden*, accessed 4 April 2018. <https://www.jo.se/en/About-JO/History/>.

<sup>34</sup> Thomas Pegram, "Diffusion across Political Systems," 733-734. The first Swedish Parliamentary Ombudsman instituted by the Instrument of Government of 1809.

<sup>35</sup> Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions In Good Governance and Human Rights Protection," *Harvard Human Rights Journal* Vol 13 1 (2000), 8-9

<sup>36</sup> Thomas Pegram, "Diffusion Across Political Institutions," 734

<sup>37</sup> Pegram, 734

<sup>38</sup> Linda C. Reif, "Building Democratic Institutions," 11

<sup>39</sup> Thomas Pegram, "Diffusion across Political Institutions," 736.

<sup>40</sup> Pegram, 736.

<sup>41</sup> Pegram, 736.

<sup>42</sup> Pegram, 736.

<sup>43</sup> Pegram, "Diffusion across Political Systems," 736.

The human rights commission is modelled around the classical commission of inquiry model.<sup>44</sup> The classical commission is “a body established by government for a defined period to inquire into matters of public concern and to advise government on policy options.”<sup>45</sup> The human rights commissions have a broad human rights mandate, which usually includes advisory, research, educational and investigative functions.<sup>46</sup> They do not necessarily have a complaints handling function, though many possess this function.<sup>47</sup> They are composed of members appointed by the executive or legislature.<sup>48</sup> The human rights commission is the model that best fits the Paris Principles.

There is, however, a wide spectrum within the human rights commission model.<sup>49</sup> Some models are vested with strong remedial powers to address individual complaints (such as the human rights commissions in Uganda, Namibia and Ghana).<sup>50</sup> Others have more simplified functions and act as government advisory bodies or research institutes with a strong promotional human rights mandate (such as the NHRIs in France, Denmark, Germany and Norway).<sup>51</sup> The latter NHRIs are normally referred to as research institutes or consultative commissions. They have an advisory or promotional human rights mandate but do not a protection mandate, as they do not have powers to investigate, or to handle individual complaints.<sup>52</sup>

In Africa, the dominant NHRI model is the human rights commission.<sup>53</sup> Nonetheless, the structures, functions and powers vary widely across countries. The two main NHRIs that are the focus of this study adopt the human rights commission model and are similar in structure and functions. These aspects will be elaborated on in Chapter Four of this thesis.

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<sup>44</sup> Pegram, 735.

<sup>45</sup> Pegram, 735.

<sup>46</sup> OHCHR, *National Human Rights Institutions*, 16.

<sup>47</sup> OHCHR, 16.

<sup>48</sup> OHCHR, 16.

<sup>49</sup> Pegram, “Diffusion across Political Systems,” 735.

<sup>50</sup> OHCHR, *National Human Rights Institutions*, 15 note 20.

<sup>51</sup> Pohjolainen, *The Evolution of National Human Rights Institutions*, 17.

<sup>52</sup> Pohjolainen, 17.

<sup>53</sup> OHCHR, *National Human Rights Institutions*, 15.

The diversity in function and structure of these institutions, adds to the complexity of understanding them. Practice at the international level indicates an increasing reliance on the GANHRI's accreditation process to determine which national human rights institution "qualifies" as such. According to Reif, the GANHRI's accreditation process gives preferential status only to national-level human rights commissions and human rights ombudsman institutions.<sup>54</sup> This is to the exclusion of other national institutions with similar functions.<sup>55</sup> This process, she argues, is used to implement the GANHRI's gatekeeping role, which has implications for NHRIs' participation and oversight functions at the international level.<sup>56</sup> It also influences the notion of institutional effectiveness.<sup>57</sup>

The GANHRI's accreditation process implies that compliance with the Paris Principles indicates that an NHRI is functionally and structurally effective, and thus best suited for human rights promotion and protection. This may not necessarily be the case, as factors such as political and social context may influence an NHRI's effectiveness. The Paris Principles do not provide for such considerations in assessing NHRIs.<sup>58</sup> In addition, the exclusion of other national or local human rights bodies from the international human rights processes, may limit the understanding of a State's implementation of and compliance with its human rights obligations.<sup>59</sup> It may also raise contradictions of formal recognition in the case where international human rights mechanisms encourage the establishment of such thematic institutions.<sup>60</sup>

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<sup>54</sup> Reif, "Boundaries of NHRI Definition," 71.

<sup>55</sup> Reif, 71.

<sup>56</sup> Reif, 71.

<sup>57</sup> Reif, 71.

<sup>58</sup> The GANHRI's Sub-Committee on Accreditation publishes General Observations, which substantiate the Paris Principles. These may in future include such contextual considerations in assessing NHRIs

<sup>59</sup> Reif, "Boundaries of NHRI Definition," 73.

<sup>60</sup> The Committee on the Rights of the Child has promoted the establishment of national institutions for children's rights. Its General Comment No. 2 focused on specialist independent human rights institutions for children, ombudspersons or commissioners for children's rights. The Committee welcomed the "establishment of NHRIs and children's ombudspersons/children's commissioners and similar independent bodies ..."  
CRC/GC/2002/2, 15 November 2002)



### 2.3.1 NHRIs in Africa and refugee rights' promotion and protection

In Africa, the rapid spread of national human rights institutions occurred from the 1990s onwards.<sup>61</sup> The trajectory of the evolution of NHRIs in Africa is closely linked to the renewal, in the 1990s, of the consideration of human rights as integral to political processes.<sup>62</sup> In addition, donor support for the creation of such institutions as part of political reforms served to provide further impetus to African governments to establish NHRIs.<sup>63</sup> Regardless of the political agenda behind the creation of the NHRIs in Africa, their existence was linked to the promotion and protection of human rights broadly and not with specific rights or group rights.

In fact, there is a normative basis for the establishment of NHRIs in the region. Article 26 of the African Charter on Human and Peoples' Rights stipulates that States Parties shall "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."<sup>64</sup> This was reinforced by the formal inclusion of NHRIs within the African human rights architecture through the African Commission's 1998 resolution on the Granting of Observer Status to National Human Rights Institutions in Africa (NHRI resolution).<sup>65</sup> The resolution was adopted on the basis of Article 45(1)(c) of the African Charter, which enjoins the African Commission to work with such institutions.<sup>66</sup>

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<sup>61</sup> Thomas Pegram, "Diffusion Across Political Systems," 737

<sup>62</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, (New York: Human Rights Watch, 2001). <https://www.hrw.org/reports/2001/africa/overview/record.html>

<sup>63</sup> Human Rights Watch, *Protectors or Pretenders?*

<sup>64</sup> ACHPR, "African Charter on Human and People's Rights," Article 26

<sup>65</sup> ACHPR, "Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa (1998), ACHPR/Res.31/(XXIV) 98 (NHRI Resolution)" *ACHPR* <https://www.achpr.org/sessions/resolutions?id=95>; An updated resolution wherein a new criteria for granting affiliate status was adopted in 2017, Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa - ACHPR/Res.370(LX)2017 <https://www.achpr.org/sessions/resolutions?id=412>

<sup>66</sup> ACHPR, "African Charter," Article 45(1)(c); Frans Viljoen, *International Human Rights Law in Africa*, (Oxford: Oxford University Press: 2007), 412

The NHRI resolution noted the “importance of the role of national institutions in the promotion and protection of human rights and in creating public awareness in Africa with regard to the institutional defence of human rights.”<sup>67</sup> The adoption of this resolution allows NHRIs to attend the African Commission’s sessions, to participate in relevant discussions and submit proposals to it.<sup>68</sup> In return, NHRIs are required to submit a biennial activity report and assist the African Commission in promoting and protecting human rights at the national level.<sup>69</sup> Despite this express basis for interaction, the relationship between the African Commission and NHRIs is perceived as open but has not evolved substantively beyond granting the affiliate status.<sup>70</sup>

One of the primary reasons is the absence of clarity about the role and relationship that the affiliate status confers upon NHRIs.<sup>71</sup> This has led to ambiguity in the manner of interaction between the African Commission and NHRIs.<sup>72</sup> There are other challenges such as the availability of resources, the lack of clarity on the role that NHRIs should play in the State reporting process either at the State report drafting stage or when the State comes under review, and the lack of understanding of the regional mechanism itself, to name a few.<sup>73</sup> An in-depth analysis of these is beyond the scope of this thesis, save to say that these will have a bearing on how effectively NHRIs can engage at the regional level on any human rights

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<sup>67</sup> Preamble to the NHRI Resolution

<sup>68</sup> ACHPR, “NHRI Resolution,” paragraph 4

<sup>69</sup> ACHPR, “NHRI Resolution,” paragraph 4 (c)

<sup>70</sup> Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, 49-55

<sup>71</sup> Frans Viljoen, *International Human Rights Law*, 412-413; Bonolo R. Dinokopila, “Beyond Paper-based Affiliate Status: National Human Rights Institutions and the African Commission on Human and Peoples’ Rights,” *African Human Rights Law Journal* Vol. 10, No.1 (2010): 27-28; Rachel Murray, *The Role of NHRIs*, 53-54; ACHPR, “National Human Rights Institutions,” ACHPR, <https://www.achpr.org/nhris> accessed 14 June 2020-On its webpage of NHRIs, the ACHPR erroneously lists them under the title ‘NGO’

<sup>72</sup> Bonolo R. Dinokopila, “Beyond Paper-based Affiliate Status...” 42-43

<sup>73</sup> Noting this gap, efforts have been put in place, largely initiated by NHRIs through their regional network, the Network of African National Human Rights Institutions (NANHRI), to develop a robust relationship between NHRIs and the African Commission. These included the creation of an NHRI forum preceding the biannual sessions of the Commission, the development of guidelines for reporting to the Commission, and training and workshops on African NHRIs’ role in strengthening the African Commission’s work and in monitoring the implementation of its decisions. See NANHRI, “The African Commission on Human and Peoples’ Rights,” NANHRI, <https://www.nanhri.org/our-work/thematic-areas/cooperation-with-regional-human-rights-mechanism/>, accessed 14 June 2020

issue. It is, however, important to note that within the context of this thesis, the African Commission created a special mechanism for refugee rights promotion. This is the Special Rapporteur on Refugees, Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa.<sup>74</sup> A discussion on the opportunities that this special mechanism presents for NHRIs will be presented in chapter 3.

In terms of form and structure, there is diversity among NHRIs in Africa that reflects the broad range that is evident in other parts of the globe. NHRIs in Africa are established constitutionally, through a legislative act or by decree. Similarly, their mandates vary widely with differences in the breadth of their mandates and the powers vested upon them. For instance, the Ugandan Human Rights Commission has the powers to convene a human rights court to adjudicate complaints while most other NHRIs offer recommendations. Some jurisdictions in Africa have a multiplicity of national institutions or other governmental organs set up to advance group rights or other specified rights.

Few NHRIs in Africa have been established with a mandate that includes explicit reference to promote and protect specific rights such as socio-economic rights or group rights.<sup>75</sup> What is pertinent within the scope of this thesis is the extent to which African NHRIs apply their mandates to the promotion and protection of refugee rights. While there is paucity in empirical evidence about NHRIs in Africa and the advancement of refugee rights, two studies were identified that provide an overview of their engagement. A study on the

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<sup>74</sup> ACHPR, “Special Rapporteur on Refugees, Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa,” *ACHPR*, accessed 14 June 2020, <https://www.achpr.org/specialmechanisms/detail?id=5>.

<sup>75</sup> This is evolving as NHRIs mandates are expanding to reflect norms created by treaties such as the CRPD and the OPCAT and adaptation based on contextual changes such as those recommended during accreditation for compliance with the Paris Principles. See e.g. Alison Corkery, “National Human Rights Institutions,” in *Ways and Means of Realizing Social and Economic Rights and Achieving the MDGs*, 139, accessed 2 February, 2018, <https://www.cesr.org/sites/default/files/WaysAndMeanscorkerychapter.pdf>

status of African NHRIs found that two NHRIs included in the sample of nine had identified either refugee rights or migrants as an emerging area of work.<sup>76</sup>

Furthermore, an analysis of the mandates of eastern and southern Africa NHRIs found that only the National Human Rights Commission of Rwanda (NHRC) has an explicit mandate to promote and protect the rights of refugees<sup>77</sup> and that the Zimbabwe Human Rights Commission (ZHRC) has an explicit mandate with respect to the prevention of torture in refugee camps.<sup>78</sup> However, despite the apparent lack of explicit mandates, several NHRIs have formally designated either “refugees” or “migrants” as a thematic area of work or have undertaken activities with respect to these categories of persons and others such as “asylum

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<sup>76</sup> NANHRI and UNDP, *The State of National Human Rights Institutions in Africa* (Nairobi: UNDP and NANHRI, 2016), 67. Note that NHRIs in 2007 adopted a declaration that among others, set out their role with respect to the promotion and protection of the rights of refugees and asylum seekers. See NANHRI, Kigali Declaration role of National Human Rights Institutions in the Protection of Refugees, IDPs and Stateless Persons, 2007” NANHRI, <https://www.nanhri.org/resource-centre/declarations-2/>, (accessed April 18, 2018) In a study undertaken by GANHRI, 8 African NHRIs indicated that they drew a distinction between refugees and migrants in their work. Andrea Kämpf, *National Human Rights Institutions and their work on Migrants’ Rights: Results of a Survey among NHRIs* (Berlin: German Institute for Human Rights, 2018), 62 [https://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/ANALYSE/Analysis\\_NHRI\\_and\\_their\\_work\\_on\\_migrants\\_human\\_rights.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analysis_NHRI_and_their_work_on_migrants_human_rights.pdf)

<sup>77</sup> Charles M Fombad (ed.), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa*, (Pretoria: Pretoria University Press, 2019), 586, 592-593, 598. This explicit function was included following an amendment to its establishing legislation done initially in 2013 and expounded upon in 2018: Law No 61/2018 of 24/08/2018 Modifying Law No 19/2013 OF 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights (Official Gazette no 38 of 17/09/2018)

Article 1: Special responsibilities of the Commission as regards to the protection of Human Rights  
Article 6 of Law no 19/2013 of 25/03/2013 determining missions, organization and functioning of the National Commission for Human Rights is modified as follows: Regarding the protection of human rights, the Commission has the following special responsibilities: 1) to monitor the compliance with the human rights, in particular with the rights of child, woman, persons with disabilities, people living with HIV/AIDS, *refugees*, migrant workers and members of their families and elderly’s rights;

<sup>78</sup> See Charles M Fombad (ed.), *Compendium of Documents on NHRIs*, 244: The Zimbabwe Human Rights Commission is constitutionally entrenched in Chapter 12, sections 232-244 of the Constitution. It provides as follows:

243 Functions of Zimbabwe Human Rights Commission 1) The Zimbabwe Human Rights Commission has the following functions –k) to visit and inspect –(i) prisons, places of detention, refugee camps and related facilities.

seekers” and “stateless persons.”<sup>79</sup> The Malawi Human Rights Commission has also extended its role in torture prevention to include monitoring refugee camps.<sup>80</sup>

While the studies cited above do not fully interrogate the refugee rights’ work undertaken by the NHRIs, the evidence they provide indicate that their mandates have either explicitly or implicitly included considerations for the importance of promoting and protecting refugee rights. This is despite having been established to focus on the rights considered to fall neatly within the scope of traditional international human rights law. Interestingly, the Zimbabwean Human Rights Commission is the only NHRI in the study that has the explicit protection of refugee rights within its founding legislation.<sup>81</sup> The Rwandan NHRC’s mandate was amended twice to include and further expound on its responsibility with respect to refugee rights’ promotion and protection.<sup>82</sup> Therefore, it may be useful to examine if having an explicit refugee rights’ mandate has a direct impact on an NHRI’s effectiveness on promoting and protecting these rights.

There are challenges with this as there is a dearth of literature on the measurement of the impact that NHRIs may have on the promotion and protection of human rights in general.<sup>83</sup> The large body of work on NHRIs generally reports on activities undertaken or the role that NHRIs could play given their mandates and performance expectations as drawn against the Paris Principles. Therefore, while it is encouraging that there are NHRIs in Africa with explicit mandates for the promotion and protection of refugee rights, it is difficult to

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<sup>79</sup> The NHRIs include the South African Human Rights Commission, the Mauritius National Human Rights Commission, the Commission for Human Rights and Good Governance of Tanzania and the Kenya National Commission on Human Rights. See Charles M Fombad (ed.), *Compendium of Documents on NHRIs*

<sup>80</sup> Charles M Fombad (ed.), *Compendium of Documents on NHRIs*, 510; See also chapter 3 on the discussion of the opportunities for NHRIs to promote refugee rights.

<sup>81</sup> Note 78 above

<sup>82</sup> Note 77 above

<sup>83</sup> Richard Carver, *Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework for Evaluation*, Bratislava: UNDP, 2014

determine if this has a higher degree of impact on the realisation of refugee rights without conducting an empirical evaluation.<sup>84</sup>

Nonetheless, with the presence of an explicit mandate for refugee rights' promotion and protection, one can assume that the NHRI would be better placed to allocate necessary resources to the promotion and protection of refugee rights. Assuming also that the operational context allows the NHRI to engage with these rights, then there is a higher likelihood that these rights would have a prominent place on the NHRI's agenda.<sup>85</sup> In turn, this may determine the extent to which the NHRI engages with these rights at the domestic, regional and international levels to influence the advancement of refugee rights.<sup>86</sup>

The crux of this thesis is that if NHRIs can influence positive outcomes for State obligations with respect to refugee rights at the domestic levels, then given their position as a link between the domestic and international human rights levels, they may play a critical role within the regional and international processes and mechanisms with respect to refugee rights. Thus, the perception of the role that NHRIs can play needs to be viewed with a two-pronged lens - one that considers a top-down implementation processes and the other that considers the bottom-up implementation process. The process through which NHRIs accomplish this role is discussed in section 2.5 below.

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<sup>84</sup> Richard Carver, *Measuring the Impact and Development*; Julie Mertus, "Evaluating NHRIs: Considering Structure, Mandate and Impact" in *Human Rights State Compliance and Social Change* edited by Thomas Pegram and Ryan Goodman (Cambridge: Cambridge University Press, 2011), 74-90.

<sup>85</sup> Sonia Cardenas, "NHRIs and State Compliance," 46- Cardenas discusses how NHRIs promote human rights norms by engaging in socialising activities essential for human rights compliance such as agenda-setting (NHRIs placing human rights issues on local and national agendas) and raising awareness about human rights within civil society and the State apparatus.

<sup>86</sup> Chris Sidoti, NHRIs and the International System, in *Human Rights State Compliance and Social Change* edited by Thomas Pegram and Ryan Goodman (Cambridge: Cambridge University Press, 2011), 100-101.

## 2.4 Paris Principles: The normative framework for NHRIs

The normative framework governing national human rights institutions derives from the Paris Principles. It is the Paris Principles that provide NHRIs part of their legitimacy within the international human rights framework.<sup>87</sup> The Paris Principles provide a broad normative framework for the status, powers and functioning of NHRIs. These are classified along four categories: competence and responsibilities, composition and guarantees of independence and pluralism, methods and operation and principles regarding the status of quasi-judicial competence.<sup>88</sup>

The Paris Principles are a set of recommendations and are not legally binding on States. However, since their adoption, they have gained substantial political and legal authority.<sup>89</sup> This is due to the extent to which they have been widely accepted and promoted at the international, regional and national levels.<sup>90</sup> At the international level, the UN has since the late 1980s adopted annual resolutions to encourage Member States to establish and strengthen NHRIs in line with the Paris Principles.<sup>91</sup> One of the most significant was the 2015 UN General Assembly resolution on national institutions for the promotion and protection of human rights.<sup>92</sup> This resolution called for the formal recognition, in all UN processes and mechanisms, of NHRIs that are compliant with the Paris Principles.<sup>93</sup>

Within the UN, the treaty bodies have also played an important role in giving the Paris Principles legitimacy. Treaty bodies have regularly recommended that States establish

<sup>87</sup> Sonia Cardenas, *Chains of Justice*, 39-44.

<sup>88</sup> UN General Assembly, "Paris Principles."

<sup>89</sup> Pohjola, "Boundaries of NHRI Definition," 10.

<sup>90</sup> Pohjola, 10.

<sup>91</sup> Cardenas, *Chains of Justice*, 39.

<sup>92</sup> UN General Assembly, "Resolution adopted by the General Assembly on 17 December 2015 [on the report of the Third Committee (A/70/489/Add.2)] 70/163. National institutions for the promotion and protection of human rights A/RES/70/163 (Resolution A/RES/70/163)," accessed 17 May, 2017, <https://undocs.org/en/A/RES/70/163>.

<sup>93</sup> UN GA, "Resolution A/RES/70/163," para 14 states:

14. Also welcomes the contribution of national human rights institutions compliant with the Paris Principles to the work of the United Nations, including of the Commission on the Status of Women, the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, the Open-ended Working Group on Ageing and the intergovernmental process of the General Assembly on strengthening and enhancing the effective functioning of the human rights treaty body system;

national institutions, in compliance with the Paris Principles, to ensure the effective implementation of treaty obligations.<sup>94</sup> For instance, the Committee on the Elimination of Racial Discrimination (CERD) adopted “General Recommendation 17 on the establishment of national institutions to facilitate the implementation of the Convention.”<sup>95</sup> It recommends that States should “establish national commissions or other appropriate bodies... taking the Paris Principles into account.”<sup>96</sup> The Committee on the Rights of the Child (CRC) adopted a comprehensive General Comment on national institutions in 2002.<sup>97</sup> The General Comment elaborated the application of the Paris Principles in the context of the Convention on the Rights of the Child.<sup>98</sup>

The Committee in its interpretation of Article 4 of the Convention deems the establishment of NHRIs as part of the State’s treaty obligations.<sup>99</sup> The Comment stipulates further, that such institutions should be established in compliance with the Paris Principles.<sup>100</sup> Treaty bodies such as the Human Rights Committee (HRC) and the Committee on the Elimination of Discrimination Against Women (CEDAW) have also developed formal relationships with NHRIs.<sup>101</sup> These include formal working methods, formal cooperation

<sup>94</sup> Pohjola, “Boundaries of NHRI Definition,” 11.

<sup>95</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 17, The establishment of national institutions to facilitate the implementation of the Convention* (Forty-second session, 1993), UN Doc. A/48/18 at 116 (1994), accessed 26 February 2018 <http://hrlibrary.umn.edu/gencomm/genrxvii.htm>.

<sup>96</sup> CERD, General Recommendation 17, para 1.

<sup>97</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 2 (2002): The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, 15 November 2002, CRC/GC/2002/2, accessed 26 February 2018, <https://www.refworld.org/docid/4538834e4.html>.

<sup>98</sup> CRC, *General Comments No. 2 (2002)*, para 1.

<sup>99</sup> CRC, *General Comments No. 2 (2002)*, para 1.

<sup>100</sup> CRC, *General Comments No. 2 (2002)*, para 4.

<sup>101</sup> Treaty bodies that have formalized a role for national human rights institutions are: The Committee Against Torture (CAT); The Committee on Migrant Workers (CMW); The Committee on the Elimination of Racial Discrimination (CERD); The Committee on the Rights of Persons with Disabilities (CRPD); and The Committee on Enforced Disappearances (CED); CEDAW and the Human Rights Committee. See for instance CEDAW statement entitled Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions, E/CN.6/2008/CRP.1, accessed 27 February, 2018, <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/StatementOnNHRIs.pdf>; Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106<sup>th</sup> session (15 October–2 November 2012), CCPR/C/106/3, accessed 27 February 2018, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en); and The relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6, 28 October 2014, accessed on 27 February. 2018.



papers or statements on engagement with NHRIs that are complaint with the Paris Principles. These documents set out the role of NHRIs in their independent capacity in the work of the respective treaty body and recognise that their role differs from yet remains complementary to that of States and CSOs.<sup>102</sup>

The reference to the Paris Principles in recent human rights treaties has also enhanced their legitimacy and provided a more nuanced legal standing.<sup>103</sup> The Optional Protocol to the International Covenant Against Torture (OPCAT), is the first international legal instrument to require the creation of a national institution (referred to as a National Preventive Mechanism (NPM)) to ensure State compliance with the treaty obligations.<sup>104</sup> The Protocol in Article 18 (4) urges States to give due regard to the Paris Principles when creating the NPM.<sup>105</sup> Furthermore, the characteristics of the national preventive mechanism that the Protocol obliges States to establish are also outlined in the Paris Principles.<sup>106</sup> Similarly, the Convention on the Rights of Persons with Disabilities (CRPD) requires States to consider the Paris Principles when “maintaining, strengthening, designating or establishing an independent mechanism to promote, protect and monitor implementation of the Convention”.<sup>107</sup>

For NHRIs, compliance with the Paris Principles may determine their membership within their international and regional networks. These networks have been established to promote their role and to build their capacity to effectively discharge their mandates.<sup>108</sup> The GANHRI adopted compliance with the Paris Principles as a criterion for membership, which

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[http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1\\_Global/CED\\_C\\_6\\_7527\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/CED_C_6_7527_E.pdf).

<sup>102</sup> GANHRI, *National Human Rights Institutions and UN Treaty Bodies: Background Paper*. (Geneva: GANHRI 2016), 11.

<sup>103</sup> Katerina Linos and Tom Pegram, "Architects of Their Own Making: National Human Rights Institutions and the United Nations," *Human Rights Quarterly* 38, no. 4 (November 2016): 1129.

<sup>104</sup> Pohjolainen, "Boundaries of NHRI Definition," 12.

<sup>105</sup> UN, Optional Protocol to the International Covenant against Torture (OPCAT).

<sup>106</sup> UN, OPCAT, Article 18-20.

<sup>107</sup> UN, Convention on the Rights of Persons with Disabilities (CRPD), Article 33 (2), accessed 26 February, 2018. [http://www.un.org/disabilities/documents/convention/convention\\_accessible\\_pdf.pdf](http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf).

<sup>108</sup> See GANHRI, <https://nhri.ohchr.org>, APF, <https://www.asiapacificforum.net>, NANHRI, <https://www.nanhri.org>, ENNHRI, <http://ennhri.org>.

is granted on a hierarchical basis based on compliance. Through a procedure of accreditation conducted by its Sub-Committee on Accreditation, NHRIs are granted a status. This status reflects the extent of their compliance with the Paris Principles. An institution is granted A-status if it is deemed to be fully compliant with the Paris Principles. NHRIs in partial compliance are awarded B-status and are granted an observer status. Those that do not comply do not receive an accreditation status and they do not have any privileges within the GANHRI. The A-status not only grants an institution the right of membership, it also guarantees the right to vote. Within the UN processes, A-status national human rights institutions can also participate in sessions of the Human Rights Council. With the adoption of the 2015 UN General Assembly NHRI resolution, the opportunities for formal engagement with all the UN processes, beyond the human rights mechanisms, will further open up spaces for A-status NHRIs to engage.<sup>109</sup>

The NHRI regional networks have varied requirements for membership. The Asia Pacific Forum of National Human Rights Institutions (APF) has a stringent inclusion process. The APF requires compliance with the Paris Principles before membership can be considered.<sup>110</sup> The Network of African National Human Rights Institutions (NANHRI) on the other hand, is less stringent in its membership criteria. Membership is open to an institution, which fits the UN definition of an NHRI, irrespective of its accreditation status.<sup>111</sup> Despite the differences in the membership criteria, the regional networks strive to promote compliance with the Paris Principles among members or potential members.

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<sup>109</sup> UN General Assembly, *Paris Principles*.

<sup>110</sup> APF, *Membership*, <https://www.asiapacificforum.net/members/>.

<sup>111</sup> Pohjola, "Boundaries of NHRI Definition," 11.

## 2.5 Norm dynamics: A theoretical framework for understanding the emergence and spread of NHRIs

As outlined above, the Paris Principles and the concept of NHRIs have become widely known and accepted within the international human rights regime and can thus be considered a “norm.” A norm is defined as “a standard of appropriate behaviour for actors with a given identity.”<sup>112</sup> There is no single theory that has been applied to understand why NHRIs have become a norm within the international human rights regime. However, there is a growing body of work postulating various theories to explain the evolution and rapid spread of NHRIs. These theories are drawn largely from the study of norms, using inter-related international relations theories such as constructivism, institutionalism, compliance and socialisation.<sup>113</sup> These theories will be described briefly below. This will be followed by a detailed discussion on the socialisation theory as the theoretical framework for understanding the evolution of national human rights institutions.

According to Reus-Smit, constructivism “focuses on ideas of norms, the development of structures and the relationship between actors and these structures as well as how identity influences actions and behaviour amongst and between actors.”<sup>114</sup> It also articulates how norms determine an actor’s attributes.<sup>115</sup> Thus, constructivism looks at “how norms develop, who promotes these norms, and who sets up different norms from the ones currently set.”<sup>116</sup> A key concept in constructivism is “internalisation” which is defined as the point at

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<sup>112</sup> Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4, (autumn 1998): 891 <http://www.jstor.org/stable/2601361>; Thomas Pegram, “Diffusion across Political Systems, 731; Trym Nohr Fjortoft, *Coping or Hoping Mechanisms: Evaluating the Effectiveness of National Human Rights Institutions* (PhD diss. University of Oslo, 2016), 18-34.

<sup>113</sup> Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 888, 893.

<sup>114</sup> C. Reus-Smit. “Constructivism in Theories of International Relations,” in *Constructivism in International Relations*, Third Edition, ed. Scott Burchill, and Andrew Linklater (Palgrave 2005), 188; Emanuel Adler, [internationalrelations.org](http://internationalrelations.org), accessed 4 April, 2018, [http://internationalrelations.org/constructivism\\_in\\_international\\_relations/](http://internationalrelations.org/constructivism_in_international_relations/)

<sup>115</sup> Reus-Smit, 198.

<sup>116</sup> Emanuel Adler, “Seizing the Middle Ground: Constructivism in World Politics,” *European Journal of International Relations* 3, no. 3, (1998): 338.

which a norm is so deeply ingrained that it is taken for granted.<sup>117</sup> Constructivism focuses on persuasion as the process through which internalisation occurs.<sup>118</sup>

Institutionalism theory has a number of variants but common within the theory is sets of formal rules, norms and beliefs which organizations and individuals are expected to follow.<sup>119</sup> The means through which institutions exert influence to cause change differs widely.<sup>120</sup> One school of thought (new institutionalism) suggests that normative pressures influence organizations.<sup>121</sup> These influences are either external or internal and may be overt or subtle. Change due to these influences may occur through coercion, mimicry, or conformance.<sup>122</sup> The change that occurs is simply accepted or is scrutinised and deemed appropriate. As with other norm-based theories, the end stage is internalisation. This is when the accepted norm is taken for granted.

Compliance theory, as its name suggests, attempts to explain why States comply with international obligations. According to Delcourt, there are four main arguments that have been put forward to explain State compliance with international law, norms, and standards.<sup>123</sup> The managerial model suggests that States comply because they view the international system from a cooperative problem-solving approach.<sup>124</sup> States thus comply because they are persuaded to “adhere to a dynamic created by the regime to which they belong.”<sup>125</sup> In the legitimacy model, compliance lies in States’ perception of the inherent qualities of the rules

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<sup>117</sup> Alastair Iain Johnston, “Treating International Institutions as Social Environments” *International Studies Quarterly* 45, no. 4 (December, 2001): 495.

<sup>118</sup> Johnston, “Treating International Institutions,” 495.

<sup>119</sup> Hsing-Kuo Wang, Jung-Feng Tseng and Yu-Fang Yen, “How do Institutional Norms and Trust Influence Knowledge Sharing? An institutional theory, Innovation, *Innovation: Management, Policy & Practice* 16, no.3, (2014): 375-376, doi: 10.1080/14479338.2014.11081994.

<sup>120</sup> Simon Reich, “Four Faces of Institutionalism: Public Policy and a Pluralistic Perspective” in *Governance* 13, Issue 4 (October 2000), 501.

<sup>121</sup> Paul J. DiMaggio and Walter Powell, *New Institutionalism in Organizational Analysis*, (Chicago: Chicago University Press, 1991), 1-38.

<sup>122</sup> Hsing-Kuo Wang, Jung-Feng Tseng & Yu-Fang Yen, “How do Institutional Norms,” 375-376.

<sup>123</sup> Barbara Delcourt, *Theory of Compliance in Oxford Public International Law*. (Oxford: Oxford University Press 2015) accessed 17 February 2018, <http://opil.ouplaw.com>.

<sup>124</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press 1995 cited in Delcourt, *Theory of Compliance*, para 9.

<sup>125</sup> Chaves and Chaves, *The New Sovereignty*.

particularly as they relate to fairness.<sup>126</sup> States comply through a process of reflexive interaction.<sup>127</sup> This leads to the general perception that the law is fair because it allocates resources in an equitable fashion and the actors have equal access to law making.<sup>128</sup>

According to Guzman, the reputational model argues that State compliance occurs because of fear of sanctions and the high value that States place on reputation.<sup>129</sup> He describes the transnational theory as one, which posits that compliance is due to the internalisation of international legal rules.<sup>130</sup> As transnational entities interact, patterns of behaviour and norms emerge.<sup>131</sup> These norms are then adopted, resulting in their assimilation within a State's domestic legal institutions, thereby leading to compliance.<sup>132</sup>

An important actor that compliance theory considers in the compliance process is that of domestic institutions. Slaughter laid the groundwork for the discussion on the role of domestic judicial institutions in compliance with international law.<sup>133</sup> She suggests that independent judicial institutions may influence compliance through empowering citizens to legally challenge governments' action or inaction.<sup>134</sup> They also have the authority to evaluate government practice against existing law, as they base their rulings on legal principles.<sup>135</sup> NHRIs, as domestic actors, can play a similar role in influencing State compliance with international obligations.

The socialisation theory is based on the socialisation process. Siegal defines this as

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<sup>126</sup> Thomas Franck, *Fairness in International Law and Institutions*, (Oxford: Clarendon Press 1995) cited in Belcourt, para 10.

<sup>127</sup> Belcourt citing Franck, para 10.

<sup>128</sup> Belcourt, citing Franck, para 10.

<sup>129</sup> Andrew Guzman, "A Compliance-based Theory of International Law," *California Law Review* 90, no.6 (December 2002): 1823-87; also Delcourt, para 11.

<sup>130</sup> Andrew Guzman, "A Compliance-based Theory," 1835-1836.

<sup>131</sup> Guzman, 1835-1836.

<sup>132</sup> Guzman, 1835-1836.

<sup>133</sup> Anne-Marie Slaughter "International Law in a World of Liberal States," *European Journal of International Law* 6 (1995): 503-538; Jana von Stein, *International Law: Understanding Compliance and Enforcement*, 2010 <https://internationallawhiugm2016.files.wordpress.com/2016/02/jana-von-stein-compliance-enforcement-of-il.pdf>

<sup>134</sup> Slaughter, "International Law," 503-538.

<sup>135</sup> Slaughter, 526, 534.

“the process by which people learn to adopt the norms, values, attitudes and behaviour accepted and practiced by the on-going system.”<sup>136</sup> The socialisation process results in the complete acceptance of the norm such that it becomes taken for granted (internalisation).<sup>137</sup> The socialization process occurs through a variety of mechanisms.<sup>138</sup> Once internalisation occurs, the norms become difficult to change and the benefits of compliance are calculated in abstract social terms, rather than concrete consequential terms.<sup>139</sup>

Socialisation theory argues that behavioural change in a State, and the conditions under which such change occurs, are influenced by normative rather than coercive factors - and is perhaps the most relevant in the discussion on national human rights institutions.<sup>140</sup> It proposes distinct theories or processes through which the international system exerts influence on the State. These are persuasion and acculturation.<sup>141</sup> Both persuasion and acculturation theories assume that States are social entities. As such, their identities are shaped by the institutionalised norms, values and ideas of the social environment in which they operate.<sup>142</sup> However, the process through which the international system influences States differs significantly between these two theories.

Acculturation refers to the “general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture.”<sup>143</sup> Unlike persuasion, acculturation is not necessarily an active process. The actor perceives that an important group holds a certain

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<sup>136</sup> Johnston, “Treating International Institutions,” 495.

<sup>137</sup> Finnemore and Sikkink, “International Norm Dynamics,” 887-917.

<sup>138</sup> Finnemore and Sikkink, 904.

<sup>139</sup> Finnemore and Sikkink, 895-896, 898, 904.

<sup>140</sup> Julie Meritus, “Evaluating NHRIs: Considering Structure, Mandate and Impact,” in Ryan Goodman and Thomas Pegram, *Human Rights, State Conformity and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012), 85-89.

<sup>141</sup> These are the dominant approaches to norm diffusion but there is no consensus on the processes within the field due to underlying ideological differences. For instance, constructivists focus on persuasion; other theorists argue that this includes coercion (Pegram) or social influence (Johnston) or a combination of two or more of such processes (Goodman & Jinks). These processes are in turn influenced by micro-processes for instance for acculturation proposes copying, emulation, inspiration or mimicry.

<sup>142</sup> Julie Meritus, “Evaluating NHRIs: Considering Structure,” 85-89.

<sup>143</sup> Ryan Goodman and Derek Jinks, “How to influence States: Socialisation and International Human Rights Law,” *Duke Law Journal* 54, no.3 (December, 2004): 626.

belief and due to material costs and benefits, decides to subscribe to that belief or position.<sup>144</sup> Therefore, acculturation does not actually involve agreeing with the merits of the norm, and may thus result in outward conformity without private acceptance or corresponding changes in practice.<sup>145</sup> Goodman and Jinks conclude that the acculturation process is neutral and as a result, “under different conditions, it may yield normatively attractive, unattractive or ambiguous results.”<sup>146</sup>

Persuasion, on the other hand, “involves the inculcation of norms so that the one side ends up convinced of the truth, validity or appropriateness of the norm, belief or practice.”<sup>147</sup> Persuasion, unlike acculturation, is an active process of engagement between and among actors. It is characterized by “argument and deliberation in an effort to bring about change.”<sup>148</sup> According to Goodman and Jinks, in the persuasion theory, international law “influences State behaviour through processes of social learning and other forms of information conveyance.”<sup>149</sup> Goodman and Jinks argue that “persuasion is not simply a process of manipulating exogenous incentives to elicit desired behaviour from the other side.”<sup>150</sup> It requires active engagement with the other actor until change in behaviour or attitude occurs.<sup>151</sup> Thus, persuaded actors accept and internalize the new norms and ideas and make adjustments in order to comply with the new norms.<sup>152</sup> In this process there is no overt coercion that occurs, rather the “actors actively assess the content of the particular message and change their minds.”<sup>153</sup>

Finnemore and Sikkink, in their work on the influence of norms, elaborate on the

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<sup>144</sup> Goodman and Jinks, “How to Influence States,” 635.

<sup>145</sup> Goodman and Jinks, 640.

<sup>146</sup> Goodman and Jinks, 640.

<sup>147</sup> Julie Meritus, “Evaluating NHRIs,” 85.

<sup>148</sup> Julie Meritus, 85 citing Alastair Iain Johnston, The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors,” in ed. D. W. Dresdner, *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (Ann Arbor: University of Michigan Press, 2002), 145, 153.

<sup>149</sup> Goodman and Jinks, “How to influence States,” 635.

<sup>150</sup> Goodman and Jinks, 635.

<sup>151</sup> Goodman and Jinks, 635.

<sup>152</sup> Goodman and Jinks, 635.

<sup>153</sup> Goodman and Jinks, 635.

persuasion process by proposing a three-stage process through which norm influence occurs.<sup>154</sup> This three-stage process is referred to as the norm life cycle. The first stage they identify is norm emergence.<sup>155</sup> In this stage, a norm is introduced by what they term norm entrepreneurs.<sup>156</sup> Norm entrepreneurs are “individuals (or organisations or States) who are dissatisfied with the existing social context and advocate different ideas about appropriate behaviour from platforms that give their ideas credence.”<sup>157</sup> These platforms could be conferences and workshops. The norm entrepreneurs try to persuade a sufficient number of States (norm leaders) to embrace new norms.<sup>158</sup> At the point which a critical mass of States adopt a norm, then the norm will be deemed as accepted.<sup>159</sup> Thus the second stage, Finnemore and Sikkink argue, is characterised by norm leaders attempting to socialize other States to follow the norm. This process is referred to as a norm cascade.<sup>160</sup> Simply stated, the norm cascades (diffuses) through the rest of the States and becomes rapidly and widely accepted.

Different processes for the diffusion of a norm include acculturation and persuasion as discussed above.<sup>161</sup> Even though the mechanisms for norm acceptance may vary, the result is that norms shape the behaviour of States. The third stage is the extreme of a norm cascade, “where norms become so widely accepted that they are internalized by actors and achieve a “taken-for-granted” quality that makes conformance with the norm almost automatic.”<sup>162</sup> At this point, the norm is accepted almost without question.

The above discussion on the norm life cycle provides a suitable framework with

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<sup>154</sup> Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 896-899.

<sup>155</sup> Finnemore and Sikkink, 896-901.

<sup>156</sup> Finnemore and Sikkink, 895, 897-900.

<sup>157</sup> Finnemore and Sikkink, 899-900. See also Matthew J. Hoffmann, *Ozone Depletion and Climate Change: Constructing a Global Response*. Albany: State University of New York Press 2005, 33-37 (Discussing norm dynamics to explain the global responses to ozone depletion and climate change.)

<sup>158</sup> Finnemore and Sikkink, “International Norm Dynamics and Political Change, 899-900.

<sup>159</sup> Finnemore and Sikkink, 899-900.

<sup>160</sup> Finnemore and Sikkink, 899-900.

<sup>161</sup> See Thomas Pagram, “Diffusion Across Political Systems,” 731.

<sup>162</sup> Finnemore and Sikkink, 899-900.



which to explain the spread of national human rights institutions. Stage one, which deals with norm emergence, began in the 1940s with the adoption of the ECOSOC resolution that encouraged States to consider establishing national committees for human rights. This stage stretches through the 1980s. During this period, there were occasional deliberations on NHRIs. The UN adopted intermittent resolutions, reports and recommendations for States to consider establishing NHRIs. The norm entrepreneurs (the UN, NGOs and the few States with existing NHRIs) were persuading other States about the favourability of adopting national mechanisms to support the implementation of international human rights norms and standards. Thus, following the 1978 seminar on NHRIs mentioned above in the NHRI evolution process, a handful of States adopted NHRIs.

The UN (mainly ECOSOC and the Commission on Human Rights), Member States, and non-governmental organisations, acting as norm entrepreneurs, continued to push the idea for the adoption of NHRIs by States. The tipping point, resulting in the norm cascade, occurred in 1993 following the adoption of Paris Principles and the Vienna Declaration and Programme of Action. The catalyst was the 1991 UN Workshop on NHRIs in Paris where the Paris Principles were drafted. As such, the 1990s was characterised with the rapid expansion of NHRIs across all regions. For example, in 1990, only one State adopted an NHRI (Namibia) compared to the period between 1991 and 1993 where eighteen States adopted NHRIs.<sup>163</sup> The current number stands at 123 NHRIs.<sup>164</sup>

The internalisation process can also be deemed to have occurred. For instance, the Paris Principles and NHRIs are commonly referred to in UN processes, resolutions and reports. Treaty bodies now also rely on information from NHRIs when considering State

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<sup>163</sup> GANHRI, *Chart of the Status of National Institutions as at 27 November 2019*, accessed 24 January, 2020 <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20-%20Chart%20%28%2027%20November%202019%29.pdf>. Note that this figure reflects those institutions that have applied for accreditation and may not accurately reflect the actual number of national human rights institutions that exist globally.

<sup>164</sup> GANHRI, *Chart of the Status*.

compliance with international legal obligations. UN processes and mechanisms have formalized their relationship with national human rights institutions, and almost as a given, consider it imperative to work closely with NHRIs. Recently concluded human rights treaties refer to the Paris Principles, and thus NHRIs, as the standard for the establishment of domestic oversight bodies.

### 2.5.1 NHRIs and State compliance

The socialisation theory can also be applied to explain NHRIs' influence on human rights compliance. Through a complex interplay of influencing mechanisms, NHRIs can contribute to the socialisation process of human rights norms within the State. The impact of such a role on State compliance (and eventual implementation of human rights) may be direct or indirect and may vary, depending on whether the mandate is protective or promotional or both.<sup>165</sup>

From the promotion aspect, Goodman and Pegram suggest that national human rights institutions can influence change in two ways. They can deepen the diffusion of international human rights norms by acting as domestic "receptor sites" for the transmission to occur—where receptor sites are institutions or structures which interact with the international system and transmit information from the international system to domestic actors.<sup>166</sup> They can also serve as agents in the translation of international norms in a manner that reflects national contexts.<sup>167</sup>

Cardenas argues that NHRIs can achieve these through exercising their promotional mandate through the following means.<sup>168</sup> As institutions situated in the nexus between the international human rights system and the domestic level, NHRIs can, through persuasion,

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<sup>165</sup> Sonia Cardenas, *NHRIs and Compliance*, 45.

<sup>166</sup> Goodman and Pegram, "State Conformity and Social Change," 12-13.

<sup>167</sup> Goodman and Pegram, 12-13.

<sup>168</sup> Sonia Cardenas, "NHRIs and Compliance" in *Human Rights, State Conformity and Social Change: Assessing National Human Rights Institutions*, eds. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, 2012), 46.

bring State actors to an understanding that human rights compliance is appropriate.<sup>169</sup>

Activities NHRIs engage in to promote human rights may contribute to this. Such activities, Cardenas suggests, may include agenda setting, where human rights issues are placed on local and national agendas and public awareness activities.<sup>170</sup> Cardenas concludes that such human rights promotion activities serve to legitimate human rights norms and dissuade from norm violations.<sup>171</sup>

At the State level, NHRIs can provide human rights training to State officials to promote an understanding of the appropriateness of human rights compliance, and in turn lead to a change in State practices.<sup>172</sup> NHRIs can also serve as intermediaries in the translation of global norms in a manner that reflects the domestic context.<sup>173</sup> By targeting civil society or ordinary people, Cardenas argues that NHRIs can, as mobilizing agents, embed human rights norms in every day social practices which may in turn lead to rising demands and claims for human rights protection.<sup>174</sup>

NHRIs' protective mandate can also be utilized to improve a State's compliance with its human rights obligations. For instance, Cardenas suggests that NHRIs can through fact-finding, generate evidence of human rights violations. Such information can then be presented to the international human rights mechanisms to apply pressure on a non-complying State to remedy the violations.<sup>175</sup> Additionally, NHRIs can use the international and regional human rights mechanisms to pressure States to comply with international human rights norms.<sup>176</sup> They can also, through the individual complaints handling procedure,

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<sup>169</sup> Sonia Cardenas, "NHRIs and Compliance," 46.

<sup>170</sup> Cardenas, 46.

<sup>171</sup> Cardenas, 46.

<sup>172</sup> Cardenas, 46.

<sup>173</sup> Cardenas, 46.

<sup>174</sup> Cardenas, 45-48; See also Beth Simmons, *Mobilizing for Human Rights*. (Cambridge: Cambridge University Press, 2009).

<sup>175</sup> Cardenas, "NHRIs and Compliance," 45.

<sup>176</sup> Cardenas, 45.

demand State accountability where human rights are violated.<sup>177</sup> Furthermore, Cardenas suggests, that NHRIs can assist human rights victims in seeking legal redress and they may participate in legal proceedings including litigation and contribute to the overall development of human rights jurisprudence.<sup>178</sup> NHRIs can therefore contribute, both directly and indirectly, to State compliance with and implementation of human rights norms and standards.

The socialisation theory discussed above would thus support the argument that NHRIs can influence the implementation of international refugee law norms and standards at the national level through activities undertaken in accordance with their promotional and protection mandates. In addition, NHRIs may inform the development of refugee law through their participation, as accountability mechanisms, at international and regional levels.

## 2.6 Conclusion

As outlined in this Chapter, NHRIs feature uniquely in the international, regional and domestic human rights landscapes. They serve a bridging role between international norms and their domestic implementation. Their rapid global expansion acknowledges the important role that they can play in promoting and protecting human rights at all levels. The role that NHRIs can play also rests on the understanding that domestic change and reform cannot happen without human rights norms and standards being embedded within State structures. It is precisely the understanding of norms, and how they influence change, that may provide an understanding of why NHRIs exist in such numbers today and the extent and processes through which they influence change to promote States' compliance with international obligations, including those that relate to refugee rights.

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<sup>177</sup> Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions" in *Global Governance* 9, No. 1 (Jan.–Mar. 2003): 25-26.

<sup>178</sup> Sonia Cardenas, "Emerging Global Actors," 26.

## **Chapter 3**

### **An Overview of the International Refugee Protection Regime: Implications for National Human Rights Institutions**

#### **3.1 Introduction**

The international refugee protection regime has evolved to include a myriad of legal instruments, institutions and mechanisms. In its infancy, it was merely a series of agreements, which confirmed States acceptance to cooperate to deal with refugees. It has evolved to include binding obligations on States to protect refugees and guarantee them specific rights. The UN has been the primary actor in promoting refugee protection. However, the process of implementation of its key legal instruments has revealed normative and implementation gaps that hamper the effective protection of refugee rights. This has resulted in calls for the revitalisation of the protection regime. It is within this context, that a role for NHRIs can be justified.

Thus, having previously discussed the nature and evolution of NHRIs, this chapter provides the background for considering the role of NHRIs within the refugee protection regime. It first provides the historical evolution of the international protection regime from the League of Nations to the UN. It outlines States' obligations as well as refugee rights and duties under the 1951 Convention. The UNHCR's mandate and responsibilities are then considered. The chapter then discusses the key features of the African refugee instrument and its contribution to the normative development of refugee protection.

A discussion on the relationship between human rights and refugee protection follows. This includes an exploration of the opportunities that international and regional human rights mechanisms present for refugee protection. The focus at the regional level will be on the African human rights mechanisms, given the topic of this thesis. The chapter then outlines the key normative and implementation gaps that impede the effectiveness of the international refugee protection framework. The role that NHRIs can play in enhancing the

refugee protection regime is explored throughout the chapter.

### 3.2 Historical background: The League of Nations

The foundations of the international refugee protection regime can be traced back to the League of Nations (the League).<sup>1</sup> The League's legal and institutional actions with respect to refugees initially focused on Russian and Armenian refugees, but broadened with the emergence of newer refugee categories in the 1920s and 1930s.<sup>2</sup> In 1921, it appointed the first High Commissioner for Refugees, Dr Fridthof Nansen, who was tasked with providing material assistance and legal and political protection to Russian refugees.<sup>3</sup> Upon his death in 1930, the League appointed a series of High Commissioners and created various successive institutions to continue his work.

The League also concluded various non-binding agreements, referred to as "arrangements," that sought to standardise legal protection primarily for Russian and Armenian refugees.<sup>4</sup> These arrangements included the international recognition of the League of Nations' travel documents provided to refugees. These documents were the functional equivalent of national travel documents and were commonly known as the 'Nansen passport.'<sup>5</sup> In 1928, the League adopted a set of minimum standards for the recognition and

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<sup>1</sup> James C. Hathaway, *The Rights of Refugees under International Law*. (New York: Cambridge University Press, 2005), 75-147.

<sup>2</sup> Hathaway, *The Rights of Refugees*, 83.

<sup>3</sup> This mandate was extended in 1924 to include Armenian refugees and in 1928 to include Assyrian, Assyro-Chaldeans, Syrians, Kurds and Turkish refugees. See Gilbert Jaeger, "On the History of the International," 729

<sup>4</sup> Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees signed at Geneva, July 5, 1922. League of Nations, *Treaty Series*, Vol. XXX, 1922, No. 855, 238-242; Plan for the Issue of a Certificate of Identity to Armenian Refugees, 31<sup>st</sup> May 1924; Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922 and May 31, 1924. Signed at Geneva, June 30, 1928. League of Nations, *Treaty Series*, Vol. LXXXIX, 1929, Nos. 2004, 48-52; Arrangement relating to the Status of Russian and Armenian Refugees. Signed at Geneva, June 30, 1928. League of Nations, *Treaty Series*, Vol. LXXXIX, 1929, No. 2005, 55-61; Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees. Signed at Geneva, June 30, 1928. League of Nations, *Treaty Series*, Vol. LXXXIX, 1929, No. 2006, 65-67.

<sup>5</sup> Hathaway, *The Rights of Refugees*, 85.

treatment of Russian and Armenian refugees (the 1928 Arrangement).<sup>6</sup> Though not binding, this was the initial agreement to standardise a range of rights for refugees.<sup>7</sup>

In 1933, the League adopted the Convention Relating to the International Status of Refugees. This was the first binding and comprehensive legal framework for refugees. It codified most of the rights covered under the 1928 Arrangement.<sup>8</sup> Though limited in its scope, it offered refugees legal protection and guaranteed some basic civil and economic rights.<sup>9</sup> Crucially, it was the first instrument to oblige States to respect the principle of *non-refoulement*, a right that is now considered fundamental to refugee law.<sup>10</sup> It also guaranteed refugee rights, either absolutely, or in equal terms with citizens of the State party.<sup>11</sup> An additional convention seeking to provide meaningful protection to refugees from Germany was adopted in 1938.<sup>12</sup> This was the “Convention concerning the Status of Refugees coming from Germany.”<sup>13</sup> It mirrored the provisions of the 1933 Convention but included two new provisions. The first provision was Article 15, which promoted the resettlement of refugees

<sup>6</sup> Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees, League of Nations *Treaty Series*, Vol. LXXXIX, No. 2005. Accessed from <http://www.refworld.org/pdfid/3dd8cde56.pdf>.

<sup>7</sup> Hathaway, *The Rights of Refugees*, 86.

<sup>8</sup> Hathaway, 87.

<sup>9</sup> League of Nations, *Convention relating to the International Status of Refugees*. 159, No. 3663 (adopted 28 October 1933, entered into force 13 June 1935). The Convention offered protection to Russian, Armenian and assimilated refugees (Assyrian, Assyro-Chaldean, Syrians, Kurds and a small number of Turks. See League of Nations, *Treaty Series* Vol. CLIX, No 3663.

<sup>10</sup> 1933 Refugee Convention at Article 3. Only eight States ratified the 1933 Refugee Convention and the complexities of the interwar period and economic hardship made it difficult for States to agree to be bound to it. For instance, few European States were willing to grant meaningful rights to refugees. See James C. Hathaway, *The Rights of Refugees*, 90. See Peter Fitzmaurice, *Anniversary of the Forgotten Convention: The 1933 Refugee Convention and the Search for Protection between the World Wars*, accessed March 2018.

<https://www.legalaidboard.ie/en/About-The-Board/Press-Publications/Newsletters/Anniversary-of-the-forgotten-Convention-The-1933-Refugee-Convention-and-the-search-for-protection-between-the-world-wars.html>. On *non-refoulement* as a norm of customary international law, see for instance, Cathryn Costello and Michelle Foster, “Non-refoulement as custom and Jus Cogens? Putting the Prohibition to Test,” in Heijer M., van der Wilt H. (eds) *Netherlands Yearbook of International Law*, 2015. Netherlands Yearbook of International Law, vol 46. (The Hague: Asser Press, 2016), 273-327. [https://doi.org/10.1007/978-94-6265-114-2\\_10](https://doi.org/10.1007/978-94-6265-114-2_10); and Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement: Opinion,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 89-177; James C. Hathaway, argues that non-refoulement while widely respected has not yet attained the level of customary international law.

<sup>11</sup> James C. Hathaway, *The Rights of Refugees*, 88.

<sup>12</sup> Hathaway, 88.

<sup>13</sup> Hathaway, 88.

outside of Europe.<sup>14</sup> The other was Article 25, which provided States with the option of renouncing the treaty without notice. These two provisions were included in an attempt to increase States' willingness to accept refugees and provide them with similar standards of care as those applicable to nationals.<sup>15</sup> Article 15's importance lies in the establishment of the notion of resettlement in "third countries" as a viable option for the long-term protection of refugees. This principle is still promoted by the UNHCR.<sup>16</sup>

As Hathaway points out, the early refugee agreements had their limitations but provided an important basis for the development of the current international refugee protection regime (and international human rights law).<sup>17</sup> Normatively, they introduced two key concepts. The first was the idea of voluntary acceptance of international supervision of State compliance with human rights norms and standards.<sup>18</sup> The second was the substance of human rights guaranteed to aliens.<sup>19</sup> In sum, through the series of agreements, States expanded the general principles of the international law concerning aliens, to meet the needs of refugees,<sup>20</sup> including for instance, waiving reciprocity and guaranteeing basic civil and socioeconomic rights.<sup>21</sup> The 1951 Refugee Convention and regional refugee instruments build upon these contributions. The League of Nations' work predates any informal or formal discussions on the influence that national institutions may have on the promotion and protection of the rights of refugees. However, there were hints that States needed to consider

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<sup>14</sup> Hathaway, *The Rights of Refugees*, 88.

<sup>15</sup> Hathaway, 89.

<sup>16</sup> Hathaway, 89.

<sup>17</sup> Hathaway, 90-91.

<sup>18</sup> Hathaway, 89.

<sup>19</sup> Hathaway, 89.

<sup>20</sup> See Kay Hailbronner and Jana Gogolin, "Aliens," in *Oxford Public International Law*. (Oxford: Oxford University Press, 2015) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e744>.

<sup>21</sup> Hailbronner and Gogolin, "Aliens."



the role of other State organs, other than foreign ministries in advancing the League's overall goals.<sup>22</sup>

### 3.3 The United Nations and the protection of refugees

The UN replaced the League of Nations in 1945 and took over refugee protection. In 1947, the UN created the International Refugee Organisation (IRO) to deal with Second World War refugees in Europe.<sup>23</sup> The IRO had a three-year mandate and was tasked with addressing every aspect of the refugee problem, which included registration, status determination, repatriation, resettlement and legal and political protection.<sup>24</sup> However, it became clear that the comprehensive nature of its work could not be completed within the mandated period.<sup>25</sup> Therefore, in 1949, the UN General Assembly resolved to replace the IRO with the United Nations High Commissioner for Refugees (UNHCR).<sup>26</sup> The UNHCR was established initially for three years as the UN General Assembly's subsidiary organ.<sup>27</sup> In 1950, it became a permanent entity when the UN General Assembly adopted its statute and initiated the process of drafting the 1951 Refugee Convention.<sup>28</sup>

#### 3.3.1 The 1951 Refugee Convention

The 1951 Refugee Convention was initially drawn up to protect refugees from Europe, but was then expanded through the 1967 Protocol, to include all other refugees without the geographical and temporal limitations.<sup>29</sup> It covers three main issues: the basic refugee

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<sup>22</sup> Martin David Dubin, "Trans governmental Processes in the League of Nations," *International Organization* 37, Issue 3 (1983): 471.

<sup>23</sup> *UN Treaty Series* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-2-10&chapter=3&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2-10&chapter=3&clang=en)

<sup>24</sup> Erika Feller, "International Refugee Protection 50 years on: The Protection Challenges of the Past, Present and Future," *IRRC* September 2001/83, no. 843 (2001): 584.

<sup>25</sup> David Kennedy, "International Refugee Protection," *Human Rights Quarterly* 8, no.1, 3.

<sup>26</sup> Kennedy, *International Refugee Protection*, 3.

<sup>27</sup> Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3<sup>rd</sup> edition (Oxford: Oxford University Press, 2007), 428.

<sup>28</sup> Goodwin-Gill and McAdam, 428-429.

<sup>29</sup> UNHCR, "Convention relating to the Status of Refugees" accessed 6 February, 2018. <https://www.unhcr.org/4ca34be29.pdf>; Hathaway, 91.

definition, the terms of cessation of refugee status and exclusion from the refugee status;<sup>30</sup> the legal status of refugees in their country of asylum, their rights and duties, including the right to *non-refoulement*;<sup>31</sup> and States' obligations, including cooperation with the UNHCR.<sup>32</sup>

The substantive rights in the 1951 Refugee Convention were derived mostly from the 1933 Refugee Convention and the 1948 Universal Declaration of Human Rights.<sup>33</sup> In addition to the core protection of *non-refoulement* (Article 33), the 1951 Refugee Convention prescribes protections for refugees.<sup>34</sup> Article 8 exempts refugees from the application of exceptional measures, which might otherwise affect them on the basis of their nationality. Article 9 preserves the right of States to take provisional measures, on exceptional grounds, against a particular person who might be determined to be a refugee. However, such action is limited to national security reasons. The Convention also guarantees freedom from penalties for illegal entry (Article 31) and freedom from expulsion except on grounds of national security or public order (Article 32). Other rights under the Convention include administrative assistance (Article 25) and travel and identification documentation (Articles 27 and 28).

The Convention also grants refugees a range of civil and socioeconomic rights. These include freedom of association (Article 15), right to work (Articles 17 & 18), right to access courts (Article 16) and rights to housing, education, and social security (Articles 21, 22, 23 & 24). The Convention proposes, as a minimum standard, that refugees should receive at least that treatment which is accorded to other non-citizens generally. It also enshrines the principle of non-discrimination in Article 3.

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<sup>30</sup> 1951 Refugee Convention, Article 1; Hathaway, *The Rights of Refugees*, 93-94.

<sup>31</sup> Articles 2-33; Hathaway, *The Rights of Refugees*, 94.

<sup>32</sup> Articles 35-40, Hathaway, *The Rights of Refugees*, 94.

<sup>33</sup> Hathaway, *The Rights of Refugees*, 93.

<sup>34</sup> Hathaway, *The Rights of Refugees*, 93-95.

### 3.3.2 The United Nations High Commissioner for Refugees and refugee protection

The UNHCR is described as the guardian of the 1951 Refugee Convention and its 1967 Protocol.<sup>35</sup> It is primarily tasked with providing international protection to refugees (and other persons within its competence)<sup>36</sup> and to seek permanent solutions to their problems.<sup>37</sup> It has both direct and indirect mandates. Its direct mandate stems primarily from its Statute and from resolutions of the General Assembly or the Economic and Social Council. It should be noted that while these resolutions extend the UNHCR's functional responsibilities, they do not directly impose obligations on States.<sup>38</sup>

The UNHCR also derives its mandate from international refugee and human rights law. For instance, Article 35 of the 1951 Refugee Convention and Article 2 of its 1967 Protocol define a supervisory role for the UNHCR. At the African regional level, the UNHCR derives this role through Article 8 of the 1969 African Refugee Convention. From international human rights law, it derives an indirect mandate from provisions such as Articles 22 and 45 of the 1989 Convention on the Rights of the Child and Article 11 of the 1961 Convention on the Reduction of Statelessness.<sup>39</sup>

The UNHCR's early work was primarily legal and technical - focusing on protection of refugees rather than providing material assistance.<sup>40</sup> It protected refugees by "identifying them, issuing travel documents, assisting in obtaining recognition of their various legal statuses (such as marriage and property) and advocating for precise guidelines for handling recognized refugees."<sup>41</sup> It had envisaged that this role would eventually be ceded entirely to

<sup>35</sup> UNHCR, accessed 18 April 2018, <http://www.unhcr.org/1951-refugee-convention.html>.

<sup>36</sup> These categories are provided in the UNHCR Statute paras 1,8,9 and 10 and in subsequent General Assembly or ECOSOC resolutions. They are: refugees and asylum seekers; stateless persons; returnees; the internally displaced and persons threatened with displacement or otherwise at risk.

<sup>37</sup> UN, Statute of the Office of the High Commissioner for Refugees, UN General Assembly Resolution 428 (V) of 14 December 1950 at Article 8.

<sup>38</sup> James C. Hathaway, *The Rights of Refugees*, 94; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 428.

<sup>39</sup> Volker Turk, "The Role of UNHCR," 155.

<sup>40</sup> David Kennedy, "International Refugee Protection," *Human Rights Quarterly* 8 (1986): 5.

<sup>41</sup> David Kennedy, "International Refugee Protection," 5.

States. Today, because of the change in the context, and the nature and flows of displacement, UNHCR's work focuses heavily on assisting large groups of people rather than to individual refugees. In many situations, individual determination of refugee status has become impractical.<sup>42</sup>

The UNHCR is governed by the Executive Committee (EXCOM), which is an intergovernmental body currently consisting of one hundred and two States.<sup>43</sup> The EXCOM meets annually in Geneva to discuss budgetary and organisational matters and prevailing refugee protection concerns.<sup>44</sup> In terms of the latter, the EXCOM adopts Conclusions on International Protection.<sup>45</sup> While these are not legally binding on States, they do have persuasive authority.<sup>46</sup> However, the extent to which these Conclusions influence positive State behaviour with respect to refugee protection is debatable.

If taken within the context of monitoring State implementation of international refugee law, an immediate challenge is that of independence. EXCOM is not an independent expert mechanism, as it comprises States.<sup>47</sup> Not all EXCOM members are party to the 1951 Convention or its Protocol, yet one of its primary tasks is to establish the content of refugee protection as envisaged by the 1951 Refugee Convention.<sup>48</sup> As the UNHCR is governed by a group of States, it is thus accountable to these States.

Furthermore, UNHCR's funding is primarily from voluntary contributions from States with only one per cent of its funding derived from the UN's core budget to cover the costs of

<sup>42</sup> UN, *Report of the Forty-eighth Session of the Executive Committee of the High Commissioner's Programme*, Geneva 13-17 October 1997. UN Doc A/AC.96/895 (20 Oct 1997) paras 18-22.

<sup>43</sup> [http://repository.un.org/bitstream/handle/11176/143531/A\\_AC.96\\_895-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/143531/A_AC.96_895-EN.pdf?sequence=3&isAllowed=y)

<sup>44</sup> Established by ECOSOC Resolution 672(XXV) in 1958, came into existence on 1 January 1969

<sup>45</sup> UNHCR, *The Executive Committee's Origins and Mandate*, accessed 17 April 2018.

<http://www.unhcr.org/executive-committee.html>.

<sup>46</sup> UNHCR, *The Executive Committee's Origins*.

<sup>47</sup> Allison Corkery, "The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law," *Australian International Law Journal*. 13 (2006): 97-127.

<sup>48</sup> Alexander Betts and James Milner, "Governance of the Global Refugee Regime," *World Refugee Council Research Paper*, no. 13 (May 2019), 3.

<sup>49</sup> ExCom Member States not party to either or both Conventions are Bangladesh, India, Jordan and Lebanon Both Kenya and South Africa are members of ExCom, accessed 17 April 2018, <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>; Alexander Betts and James Milner, "Governance of the Global Refugee Regime," 3.

administrative functions.<sup>49</sup> The UNHCR does not determine its budget. Rather, the EXCOM does this through the Conclusions. These conclusions on the UNHCR's budget are binding and may therefore, limit the UNHCR's capacity to determine how to spend its funds. In addition, most States earmark their contributions to the UNHCR.<sup>50</sup> As a result, its activities are implemented under heavy influence of State interest, which has led to the curtailment of the UNHCR's important role of ensuring compliance with international refugee law.<sup>51</sup> It is thus difficult to construe or perceive the UNHCR as an independent monitoring body. Additional challenges with UNHCR's role within the refugee protection regime are explored below.

Notwithstanding the above, the UNHCR plays an important role in international refugee protection. It operates within a complex and dynamic context that is heavily influenced by States and limited in resources. Yet, it has made important strides to advance refugee protection. For example, the UNHCR promoted the understanding of refugee protection within a human rights context. This has opened up avenues for protection of refugees (and other forcibly displaced persons) beyond the traditional refugee framework. The UNHCR has also contributed to the development of other international and regional instruments and declarations on refugee protection. It also remains a key actor in the development and implementation of refugee law at the domestic level. In addition, it influences the development of standards for refugee protection through the EXCOM's Conclusions. These are adopted by consensus by States, thereby reflecting a commonly

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<sup>49</sup>UNHCR, *UNHCR Figures at a Glance*, accessed 17 April 2018. <http://www.unhcr.org/figures-at-a-glance.html>

<sup>50</sup> UNHCR, *UNHCR's 2018-2019 Financial Requirements*. 41, [http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter\\_Financial.pdf](http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter_Financial.pdf).

<sup>51</sup> The previous High Commissioner for Refugees, Ruud Lubbers, acknowledged UNHCR's particular vulnerability to States' interest due to the nature of its funding when he stated: "The fact that a number of governments decide case by case, on a voluntary basis, when and what they will support, makes UNHCR much too vulnerable." in UNHCR, *Refugee* 1, no.122, (2001), 6. Michael Barutciski, provides a detailed analysis of the negative impact that States' influence can have on UNHCR's role in "The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)," *International Journal of Refugee Law* 8, no. 1/2 (1996): 49-110.

agreed upon understanding of standards for refugee protection. Therefore, they have a normative influence on the refugee protection regime as they direct UNHCR's practice.<sup>52</sup> They also aim to influence and guide State conduct.<sup>53</sup>

Despite its influence in promoting refugee protection through a human rights lens, there is limited evidence both in terms of research and practice, that the UNHCR has pursued national human rights institutions as key actors in advancing refugee protection. This may be due to several factors. As discussed in chapter 2, NHRIs which are traditionally viewed through a human rights lens, and evolved as such, did not receive substantive consideration within the UN processes until the 1970s i.e. almost two decades after the signing of the 1951 Refugee Convention and a few years after the conclusion of its 1967 Protocol.

In addition, within the UN architecture, NHRIs' guardianship rests with the Office of the High Commissioner for Human Rights (OHCHR) through its National Institutions and Regional Mechanisms Section (NIRMS). This positioning of NHRIs within the UN may have influenced the focus on the issues traditionally viewed to fall within the scope of international human rights law rather than broadly to also include the UNHCR's work.<sup>54</sup> This is also reflected in the fact that the UNHCR's annual consultations, have been held for over three decades with NGOs and civil society, but with no formal inclusion of NHRIs..<sup>55</sup>

The result is that NHRIs are peripheral actors and their engagement with the UNHCR at global and country levels is not systematic and might not yield the optimal results to ensure effective promotion and protection of refugee rights. For instance, the EXCOM, mentioned

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<sup>52</sup> Allison Corkery, "The Contribution of the UNHCR Executive Committee," 2.

<sup>53</sup> Corkery, 2.

<sup>54</sup> OHCHR, "OHCHR and NHRIs," accessed 30 May, 2020, <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>

<sup>55</sup> UNHCR, "A Guide for Participants: Annual Consultations with NGOs," <https://www.unhcr.org/afr/events/conferences/5aa7e1377/2018-unhcr-annual-consultations-ngos-guide-participants.html> (accessed 30 May 2020). The UNHCR's guide for participants for the annual consultations sets out the strict criteria that participants must meet in order to participate in the consultations. Thus, for instance an NHRI must either be a member of the International Council of Voluntary Agencies; have a consultative status with ECOSOC with a demonstrated interest in refugee matters; be a UNHCR implementing or operational partner (a letter of recommendation from a UNHCR official is required for the latter).

above, which precedes the UNHCR's annual consultations, provides an avenue through which NHRIs can play a significant role in encouraging State compliance with reporting. The apparent lack of engagement with NHRIs in that process is a missed opportunity for NHRIs at both the international and domestic levels. NHRIs may also occupy a peripheral role, as they may possibly be viewed as lacking the specialist expertise on refugee rights characteristic of many other organisations that exist in this field.<sup>56</sup>

### **3.4 The Global Compacts on Refugees and Migration**

The Global Compacts on Refugees (GCR) and the Global Compact on the Safe, Orderly and Regular Migration (Global Compact on Migration), are the outcomes of a UN-led process to determine avenues for the international community to effectively respond to migration, whether forced or voluntary. The two Compacts are complementary but non-binding and their implementation relies on global consensus through a multi-stakeholder approach.<sup>57</sup> The Global Compact on Refugees (GCR), which is the blueprint for States' responsibility sharing for refugees and asylum seekers, is silent on NHRIs. In contrast, the complementary compact to the GCR, the Global Compact on for the Safe, Orderly and Regular Migration (Global Compact for Migration or GCM), includes NHRIs as key partners in its implementation.<sup>58</sup>

The Global Compact on Migration follows the emerging normative trend to promote independent human rights institutions such as NHRIs as a monitoring mechanism.<sup>59</sup> For example, the GCM proposes that NHRIs would monitor migrants' access to basic services and that they would play a vital role in preventing, detecting and responding to racial, ethnic

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<sup>56</sup> Recognition of partnership with UNHCR includes a "demonstrated interest in refugee matters." See note 55 in this chapter

<sup>57</sup> UN, Global Compact on Refugees, B5. Guiding Principles, 3; UN The Global Compact for Migration para. 15 and 44

<sup>58</sup> UN, "The Global Compact for Migration," paragraphs 15, 18 (c), 27 (c), 28 (c), 31 (d), 33 (d) and 44

<sup>59</sup> See CRPD, Article 33 and OPCAT, Article 18(2)

and religious profiling of migrants by State authorities.<sup>60</sup> The GCM also envisages a key role for NHRIs in addressing systemic challenges related to intolerance, xenophobia, racism and all other multiple and intersecting forms of discrimination.<sup>61</sup> While the GCR and GCM have been conceived as complementary, with the assumption that their implementation would draw from both processes where overlaps occurred,<sup>62</sup> in the context of this thesis, the challenge identified is linked to the inclusion of NHRIs in one process and absence of a defined role for NHRIs in the other process. As such, would this influence the NHRIs focus on migration rights broadly at the expense of refugee rights?

The reported NHRI activities seem to indicate that this is the case. The GANHRI and NHRIs across the globe have embarked on the process of operationalising their role with respect to the GCM at the expense of the GCR - in other words, the rights of migrants and not the rights of refugees. For instance, the GANHRI conducted a baseline survey to determine the extent to which NHRIs worked on migration issues. This survey failed to capture NHRIs' work on refugee rights. According to the GANHRI, the focus of the survey was on human rights issues of migration and not on asylum and refugee-related aspects as these fell within the purview of another compact (the GCR). However, this survey would have served an important basis to determine the extent to which NHRIs addressed refugee rights and in turn inform a strategic approach to implementing the compacts.

At the African regional level, the NANHRI's migration programme, as will be discussed in chapter 6 and 7, focuses on NHRIs' role in addressing irregular migration within the context of the Global Compact for Migration. The inclusion of the objective on monitoring refugee rights was a compromise and the agreed intervention with respect to

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<sup>60</sup> UN, "Global Compact..." para. 31 (d)

<sup>61</sup> UN, "Global Compact..." para 33 (d)

<sup>62</sup> Volter Türk, "The Promise and Potential of the Global Compact on Refugees," *International Journal of Refugee Law* 30, no. 4 (Dec 2018): 577–8.



refugee rights was only with respect to immigration detention.<sup>63</sup> Therefore, while the specific areas noted for NHRI responsibility within the Global Compact for Migration apply equally to refugees and asylum seekers, the subsequent NHRI practice, seems to reinforce a separation rather than synergising efforts to address migrants' rights and refugee rights.

### **3.5 Refugee protection in Africa: The 1969 Refugee Convention and the African human rights system**

Within the African region, the refugee rights regime is governed primarily by the 1969 Convention Governing the Specific Aspects of Refugee Protection (The 1969 Refugee Convention). The 1969 AU Refugee Convention was influenced heavily by the 1951 Convention and was drafted with assistance from the UNHCR.<sup>64</sup> It incorporates the provisions of the 1951 Refugee Convention<sup>65</sup> but adds to the grounds for the recognition of a refugee. Article I (2) provides that:

The term “Refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part [or] the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>66</sup>

The UNHCR, in theory, employs both definitions in its operations in Africa.<sup>67</sup> However, in practice, both the UNHCR and States often recognise refugees in Africa only under Article 1(2), even though Article 1(1) may equally apply.<sup>68</sup> This, according to Sharpe, “is due to the

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<sup>63</sup> Interview with service provider participant 5, Nairobi, Kenya; See NANHRI, *Migration Migration in Africa Promoting Respect of Fundamental Rights for Refugees and Migrants in Transit Camps* (Nairobi: NANHRI, 2018), 3, 5.

<sup>64</sup> Barbara Harell-Bond, *Refugees and the International System: The Evolution of Solutions*, 6, accessed 1 April 2018 <https://www.rsc.ox.ac.uk/files/files-1/r-refugees-international-system-1995.pdf>

<sup>65</sup> Without the 1 January 1951 time limit as agreed to in the 1967 Protocol to the 1951 Convention

<sup>66</sup> AU, *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

<sup>67</sup> UN General Assembly, *Note on International Protection*, 7 September 1994, A/AC.96/830, para. 32, accessed 3 April 2018, <http://www.refworld.org/docid/3f0a935f2.html>.

<sup>68</sup> Marina Sharpe, *The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions* in *McGill Law Journal* 58, no.1 (2012): 102-103.

relative ease in applying the 1969 Refugee Convention's Article 1(2) in situations of mass influx that often characterize refugee movements in Africa."<sup>69</sup>

Sharpe provides an in-depth analysis on the significant contributions that the 1969 Refugee Convention has made to the content of refugee law.<sup>70</sup> In sum, these normative contributions relate to: the refugee definition, the concept of asylum, the content of *non-refoulement* and concepts of responsibility sharing, temporary protection and voluntary repatriation. The 1969 Refugee Convention, as mentioned above, broadened the definition of a refugee. This definition was subsequently included in the Cartagena Declaration, the soft law source of refugee protection for the Americas.<sup>71</sup> This additional refugee definition also underlies the UNHCR's argument for a broadened interpretation of the refugee definition to take account of situations of mass displacement.<sup>72</sup>

In terms of the right to asylum, the 1969 Refugee Convention urges States to grant asylum and to do this as a peaceful and humanitarian act.<sup>73</sup> It further requires States not to view the granting of asylum to refugees as an unfriendly act by other States. This provision was expanded upon in Article 12(3) of the African Charter on Human and Peoples' Rights (African Charter), which provides that "every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions."<sup>74</sup>

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<sup>69</sup> Sharpe, "The 1969 African Refugee," 102-111. See Rainer Hofmann, *Refugee Law in the African Context*, (1992): 329 <http://www.zaoerv.de/>.

<sup>70</sup> Sharpe, "The 1969 African Refugee," 102.

<sup>71</sup> *Cartagena Declaration on Refugees* para 3 UNHCR, accessed 17 April 2018 <http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>

<sup>72</sup> Richard Greenfield, "The OAU and Africa's Refugees" Yassin El-Ayouty and I William Zartman eds. *The OAU after Twenty Years* (New York: Praeger, 1984), 224 cited in Marina Sharpe, "The 1969 African Refugee Convention," 103.

<sup>73</sup> African Commission on Human and Peoples' Rights (ACHPR), *Convention Governing the Specific Aspects of Refugee problem in Africa* (1969 Refugee Convention) (entered into force 20 June 1974) <http://www.achpr.org/instruments/> Article 2(1), Article 2(2).

<sup>74</sup> ACHPR, *African Charter on Human and Peoples' Rights* (entered into force 21 Oct 1986) <http://www.achpr.org/instruments/>.

The 1969 Refugee Convention also broadened the principle of *non-refoulement* both in terms of content and application. Unlike the 1951 Refugee Convention, the 1969 Refugee Convention provision on *non-refoulement* does not have a provision on exclusion on the basis of national security. The principle enshrined in Article 2(3) states: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in the territory where his life, physical integrity or liberty would be threatened...”<sup>75</sup> Thus, as Rutinwa asserts, *non-refoulement* applies to “both non-rejection at the borders, non-return and even to persons who are still in places where they fear harm.”<sup>76</sup>

The Convention also formalized three other fundamental concepts of refugee law. These are responsibility sharing, temporary protection and voluntary repatriation.<sup>77</sup> African States recognized that the refugee burden would be disproportionate, simply due to an “accident of geography.” In recognition of this, the 1969 Convention provides in Article 2(4) that:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

The Convention does not spell out what “appropriate measures” entails but this is understood to mean regional resettlement, financial assistance and political responsibility sharing.<sup>78</sup> Several States have invoked this Article. In the 1970s and early 1980s, due to pressure from the South African apartheid regime, some southern African states were forced to evacuate South African refugees from their territories and had them resettled in other African

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<sup>75</sup> 1969 OAU Refugee Convention.

<sup>76</sup> Bonaventure Rutinwa, “The End of Asylum? The Changing Nature of Refugee Policies in Africa” *Refugee Survey Quarterly* 21, no.1-2 (2002): 5.

<sup>77</sup> Marina Sharpe, “The 1969 African Refugee,” 108.

<sup>78</sup> Marina Sharpe, “The 1969 African Refugee,” 108.

countries.<sup>79</sup> The UNHCR has also resettled refugees under this Article. In the early 1960s, the UNHCR airlifted Rwandan refugees from the then Congo Kinshasa to Tanzania due to serious insecurity problems the refugees faced in their country of first asylum.<sup>80</sup>

Article 2(5) further states: “Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with [Article 2(4)].” This captures the notion of temporary protection.<sup>81</sup> The UNHCR has since developed guidelines for States, with respect to the extension of temporary protection in situations of mass influx directed primarily at States that are not party to the refugee conventions.<sup>82</sup>

Moreover, the 1969 Refugee Convention is the only legal instrument that articulates the voluntariness of refugee repatriation.<sup>83</sup> This core principle of refugee law is stated in Article 5(1): “The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.” Article 5 goes on to elaborate the principles and the procedures of implementing voluntary repatriation including mandating “countries of asylum,” “countries of origin,” “voluntary agencies and international and intergovernmental organisations” to assist refugees with the process of return.

The 1969 Refugee Convention is also silent on the role of national institutions in the promotion and protection of refugee rights. However, within the African context, and as discussed in Chapter 1, the entity tasked with the promotion and protection of human rights is

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<sup>79</sup> Bonaventure Rutinwa, “The End of Asylum? 18-19. These were Botswana, Lesotho and Swaziland. The refugees were resettled in other African countries mainly Tanzania, Zimbabwe, Zambia and, to a lesser extent, Kenya and Uganda

<sup>80</sup> Bonaventure Rutinwa, “The End of Asylum?” 19.

<sup>81</sup> Sharpe suggests that this was probably due to the need to protect refugees in front-line States from incursions by South African state agents who frequently pursued anti-Apartheid activists into their countries of asylum. As noted in the preceding discussion on Article 2(4), Botswana, Lesotho and Swaziland did request resettlement of South African refugees due to pressure from the South African government.

<sup>82</sup> UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*.

<http://www.unhcr.org/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html>

<sup>83</sup> 1969 OAU Refugee Convention.

the African Commission on Human and Peoples' Rights (African Commission). The African Commission was created under Article 30 of the African Charter on Human and People's Rights (Banjul Charter). In addition, the Banjul Charter, in its Article 26, requires States to establish and improve national institutions mandated to promote and protect human rights.<sup>84</sup>

Thus, the Banjul Charter formally recognises a role for institutions such as NHRIs and provides a legal basis for the African Commission to formally work with NHRIs including within the context of refugee rights' promotion and protection. This is by virtue of its role of overseeing the implementation and interpretation of the Banjul Charter and its protocols, including with respect to those articles that specifically relate to refugee rights, and the promotion of the implementation of the 1969 Refugee Convention. While the regional framework locates NHRIs clearly within the human rights regime, there is limited evidence of substantive engagement between the ACHPR and NHRIs either with respect to the promotion and protection of human rights broadly or specifically, with respect to refugee rights. This is discussed below.

### **3.5.1 The African Commission and NHRIs: Opportunities for the promotion and protection of refugee rights**

The regional level provides opportunities for refugee rights promotion and protection primarily through the African Commission. Other regional mechanism that could provide opportunities for refugee rights promotion and protection are the African Committee of Experts on the Rights and Welfare of the Child (Committee of Experts) and the New Merged Court (through the amalgamation of the African Court on Human and Peoples' Rights (African Court) and the African Court of Justice).<sup>85</sup> The African Commission, the Committee

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<sup>84</sup> ACHPR, "African Charter on Human and People's Rights," *ACHPR*, accessed 16 November, 2017. <http://www.achpr.org/instruments/achpr/>.

<sup>85</sup> See also Marina Sharpe, *The Regional Law of Refugee Protection in Africa*, (Oxford: Oxford University Press, 2018): 155-188, 205, 218

of Experts, and the African Court have all addressed refugee rights matters.<sup>86</sup> It is, however, the African Commission that has engaged more frequently and substantively on refugee related matters including through the creation of the mandate of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons (Special Rapporteur) and signing a memorandum of understanding with the UNHCR to facilitate the promotion of refugee rights within the region.<sup>87</sup>

There are other entities within the African Union that have a mandate for refugee rights promotion and protection, but these operate distinctly from the African Commission and this has led to an incoherent approach for advancing refugee rights at the regional level.<sup>88</sup> Viljoen, Odunkalu and Sharpe have identified this and other challenges that the AU and its mechanisms face, primarily due to legal and institutional weaknesses.<sup>89</sup> An analysis of these challenges is beyond the scope of this thesis. However, the existence of these institutions and mechanisms within the regional refugee protection regime requires reference to them. This section will focus on the African Commission and its mechanisms with respect to refugee rights since it is the only entity, which has formally recognised NHRIs within its processes.

The relationship between the African Commission and the African NHRIs is facilitated primarily through the regional NHRI network - NANHRI. For instance, it is through NANHRI that NHRIs have negotiated their recognition before the African Commission. It is also through NANHRI that NHRIs coordinate their participation at the

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<sup>86</sup> Gina Bekker, "The Protection of Asylum Seekers and Refugees," 9-28; Marina Sharpe, *The Regional Law of Refugee Protection*, 192-218

<sup>87</sup> Gina Bekker, 9-25.

<sup>88</sup> Marina Sharpe notes that the African Commission's work on refugee issues occurs largely in isolation of AU's efforts and that it has failed to collaborate with other AU refugee related entities (156-219). These include: The Specialized Technical Committee (STC) on Migration, Refugees and IDPs, the Permanent Representatives' Committee (PRC) Sub-Committee on Refugees, Returnees and IDPs, the Coordinating Committee on Forced Displacement and Humanitarian Action, the Divisions of Humanitarian Affairs, Refugees and Displaced Persons

<sup>89</sup> See for instance Frans Viljoen, *International Human Rights Law in Africa 2<sup>nd</sup> Edition*, (Oxford: Oxford University Press, 2012); Chidi Odunkalu, "From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples' Rights and Organs of the African Union," *Human Rights Quarterly* 35, no. 4 (2013): 850-869. [10.1353/hrq.2013.0056](https://doi.org/10.1353/hrq.2013.0056); Marina Sharpe, *The Regional Law*, 195-219.

African Commission's public sessions. The NANHRI has also developed guidelines for NHRIs to support their engagement with the regional mechanisms.<sup>90</sup> While the guidelines do not specifically address engagement in terms of refugee rights promotion and protection, they provide a succinct approach, which if implemented by NHRIs, would result in better engagement between them and the regional mechanisms and processes.

The African Commission offers specific avenues, which remain substantially under explored by African NHRIs.<sup>91</sup> These are its public sessions, mentioned above, and its special mechanisms. The interaction between the African Commission and the NHRIs is governed by the resolution on the granting of affiliate status to NHRIs (Resolution ACHPR/Res.370 (LX) 2017) and its rules of procedure as revised in 2020. The resolution as discussed in chapter 2, affords NHRIs legal standing before the African Commission.<sup>92</sup> It sets out the criteria for granting the status and the responsibilities that arise for NHRIs once accorded the affiliate status. It is through this affiliate status that NHRIs can participate in the work of the African Commission and its mechanisms, including attendance at its public sessions.

During the African Commission's public sessions, the NHRIs with an affiliate status can address any human rights issue of concern including demanding State accountability for violations of refugee rights.<sup>93</sup> The NHRIs can also propose items for the agenda (subject to the Commission's Bureau's final approval) and address those issues during the public sessions.<sup>94</sup> NHRIs are also required to report on their activities and can utilise this function to

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<sup>90</sup> NANHRI, *Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights*, (Nairobi: NANHRI, 2016).

<sup>91</sup> Bonolo R Dinokopila, "Beyond Paper-based Affiliate Status," 41-43; NANHRI, *Guidelines on the Role of NHRIs*, 7; See also Robert Doya Nanima, "The ACHPR and ACERWC on Ending Child Marriage: Revisiting the Prohibition as a Legislative Measure," *Economic and Social Rights Review* 20, no. 3 (2019): 12

<sup>92</sup> The Resolution on Granting Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa (ACHPR/Res.370(LX)2017) replaced the 1998 Resolution on Granting Observer Status to National Human Rights Institutions in Africa, (ACHPR/Res.31)

<sup>93</sup> Marina Sharpe, *The Regional Law*, 198: The ACHPR has interpreted its mandate to encompass the other African human rights treaties other than the African Charter.

<sup>94</sup> Centre for Human Rights, *A Guide to the African Human Rights System*, (Pretoria: Pretoria University Law Press, 2016), 14

raise issues of concern to the African Commission. Crucially, both the updated affiliate status resolution and the rules of procedure have widened the scope of human rights institutions recognised by the African Commission to include specialised human rights institutions. This would include institutions such as the gender commissions and ombudsman.

Of note is that the Commission adopts country-specific as well as thematic resolutions specifically on refugees and displaced persons during its sessions.<sup>95</sup> The Commission has also made concluding observations about areas of concern as well as the need for action in respect of the protection of refugee rights.<sup>96</sup> However, the Commission lacks a mechanism to follow up on its recommendations and concluding observations.<sup>97</sup> This is a gap that NHRIs can fill as they perform a similar function within the UN mechanisms and processes, with respect to State reporting and follow up on recommendations or concluding observations. Importantly, the African Commission revised its rules of procedure at its 27<sup>th</sup> Extra-Ordinary Session to require the transmission of its concluding observations on State reports to NHRIs whose States were under review.<sup>98</sup> This amendment to the rules of procedure was done precisely to enhance the NHRIs' role in following up with the African Commission's recommendations.<sup>99</sup>

The African Commission also has a special procedure i.e. the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons.<sup>100</sup> The creation of this mandate has contributed to the African Commission's promotional activities with respect to refugee rights and those of IDPs within the region.<sup>101</sup> There are critiques about the value of

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<sup>95</sup> Gina Bekker, "The Protection of Asylum Seekers and Refugees," 20-25

<sup>96</sup> Gina Bekker, 20-25

<sup>97</sup> Gina Bekker, "The Protection of Asylum Seekers and Refugees," 20-25

<sup>98</sup> ACHPR, "Press Release on Publication of New Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020," *ACHPR*, July 7 2020, <https://www.achpr.org/pressrelease/detail?id=518> (accessed 12 July, 2020).

<sup>99</sup> The ACHPR notes: "in order to enhance the role of National Human Rights Institutions (NHRIs) in follow up on recommendations of the Commission, provides that the Concluding Observations on State Reports would be transmitted to the NHRI(s) in addition to the government." ACHPR, "Press Release on Rules of Procedure."

<sup>100</sup> ACHPR, "Resolution on the Renewal of the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa," (61<sup>st</sup> Ordinary Session, 1-15 November, 2017) ACHPR/Res.379

<sup>101</sup> Gina Bekker, "The Protection of Asylum Seekers," 24



the mandate. For instance, Naldi and D’Orsi conclude that the mandate has had limited effect and that the Commission should reconsider its role.<sup>102</sup> Viljoen argues that the special procedure mandates, in general, take away from the Commission’s limited resources and detract from its core protective function.<sup>103</sup> In addition, Sharpe found that the current focus is not on refugees and asylum seekers, but is rather on IDPs, nationality and statelessness, noting here that the mandate as provided for in its enabling resolution refers only to activities with respect to “refugees, asylum seekers and internally displaced persons.”<sup>104</sup> The UNHCR’s relationship with the mandate has also evolved to focus entirely on issues related to nationality and statelessness and not on refugees and asylum seekers as had been indicated in its MOU with the African Commission.<sup>105</sup>

With respect to NHRIs, the Special Rapporteur has a comprehensive mandate that includes the requirement to “cooperate and engage in dialogue with Member States, *National Human Rights Institutions*... in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons.”<sup>106</sup> The Special Rapporteur is tasked with evaluating States’ compliance with international refugee rights norms and standards; providing recommendations to encourage better protection of refugee rights, conducting country visits and assessing human rights conditions including in refugee camps or situations of forced displacement.<sup>107</sup> In addition, the Special Rapporteur can receive information, including from NHRIs, on cases or situations concerning the persons within their mandate.

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<sup>102</sup> Gino J. Naldi and Cristiano D’Orsi, “The Role of the African Human Rights System with Reference to Asylum Seekers,” in Ademola Abass and Francesca Ippolito (eds) *Regional Approaches to the Protection of Asylum Seekers: An International Perspective* (Farnham: Ashgate, 2014), 40 cited in Marina Sharpe, *The Regional Law*, 209

<sup>103</sup> Frans Viljoen, *International Human Rights Law*, 296-297 cited in Marina Sharpe, *The Regional Law*, 209

<sup>104</sup> ACHPR, “Resolution on the Renewal of the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internationally Displaced Persons in Africa,” (61<sup>st</sup> Ordinary Session, 1-15 November, 2017) ACHPR/Res.379

<sup>105</sup> Marina Sharpe, *The Regional Law*, 209

<sup>106</sup> ACHPR, “Resolution on the Renewal of the Mandate”

<sup>107</sup> ACHPR, “Mandate of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants,” ACHPR; International Justice Resource Centre, “Mandate of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants,” IJRC, (accessed 4 August, 2020)

The mandate holder is also empowered to conduct promotional activities, including in cooperation with other stakeholders, on rights of persons who fall within their mandate. Thus, NHRIs can engage directly with the Special Rapporteur, including when the mandate-holder undertakes their activities.

However, a review of the Special Rapporteurs' activity reports revealed scant reference, if at all, to NHRIs. Out of nine publicly available reports, only two Special Rapporteur's activity reports make any specific recommendations to NHRIs. Two other reports refer to the mandate-holder participating in a NHRI conference. There is no specific reference or indication that the Special Rapporteurs have considered NHRIs as key partners when undertaking their activities.

As indicated earlier, there are challenges that hamper the constructive engagement between the African Commission as the custodian of the African human rights treaties and NHRIs as one of the implementation conduits. Nonetheless, the discussion above highlights important ways through NHRIs can engage substantively with the mechanisms and processes in place. Also, the African Commission has displayed goodwill towards working with NHRIs. Beyond adopting the NHRI resolution and incorporating them within its rules of procedure, the African Commission has also contributed to the development of some modalities for engagement with NHRIs in various thematic areas. These include in the prevention of torture, in the follow up with implementation of its recommendations and access to information for Africa.<sup>108</sup>

In addition, numerous former NHRI Commissioners have served or currently serve as Commissioners in the African Commission, thereby precluding notions that NHRIs may be

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<sup>108</sup> The NANHRI coordinated NHRI involvement in these processes. The researcher was involved in the launch of the Robben Island Guidelines for the Prohibition and Prevention of Torture while working for the SAHRC and several SAHRC employees were included in the consultation process during the development of the guidelines. In addition, several SAHRC staff members were also involved in the development of the Model Law on Access to Information for Africa through the SAHRC's Access to Information Unit.

unfamiliar actors for human rights promotion and protection in Africa.<sup>109</sup> Should further clarity on the modalities for substantive engagement be determined, especially with the Special Rapporteur on Refugees, NHRIs could make important contributions to the promotion and protection of refugee rights. In turn, this would influence the development of clearer channels for engagement between the domestic and regional levels with respect to the realisation of refugee rights and contribute to the development of norms for NHRI engagement with refugee rights.

### 3.6 Human rights and refugee protection

International human rights law provides a complementary protection framework for refugees.<sup>110</sup> Indeed, Chetail argues that the interactions between the two fields of international law “have become so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other.”<sup>111</sup> Arguing further, he asserts that international human rights law has become the primary basis for protecting refugees.<sup>112</sup> The evidence supporting these arguments comes primarily from interpretation of State obligations for refugee rights protection by treaty bodies - in the absence of a proper monitoring mechanism for the 1951 Refugee Convention.<sup>113</sup> It is from this complementary protection that additional legal obligations are derived with respect to refugee rights.<sup>114</sup>

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<sup>109</sup> Centre for Human Rights, *A Guide to the African Human Rights System*, 13

<sup>110</sup> In General Conclusion No. 81, the UNHCR’s Executive Committee noted at para (e) that States were obliged to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection. UNHCR, Executive Committee Conclusion No 81, “General Conclusion on International Protection” (1997) <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>.

<sup>111</sup> Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law,” in Ruth Rubio Human Rights and Immigration, Oxford: Oxford University Press, 2014: 68 (pp 19-72)

<sup>112</sup> Vincent Chetail, “Are Refugee Rights Human Rights?”, 69.

<sup>113</sup> Chetail 69; Hathaway, *Refugee Rights*; Harvey, “Time to Reform?”

<sup>114</sup> Jane McAdam, “The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection,” *New Issues in Refugee Research*, No. 125, 2006: 1-3.

The jurisprudence and reports from treaty bodies indicates that they are increasingly considering refugee issues.<sup>115</sup> Besides reviewing individual communications, the treaty bodies are also taking into account refugee concerns when reviewing States parties' reports. In addition, through the General Comments, they are interpreting treaty provisions to include protection of refugee rights. For instance, the Human Rights Committee (HRC) affirmed that the International Covenant on Civil and Political Rights (ICCPR) obliges States to implement its provisions without discrimination between citizens and aliens.<sup>116</sup> It further held that States were legally required to extend the Covenant rights to all persons within their territories, including asylum seekers and refugees.<sup>117</sup> The HRC has also interpreted Article 7, which prohibits torture, to contain an inherent element of *non-refoulement*.<sup>118</sup> Furthermore, the HRC has considered refugee and asylum policies in relation to the ICCPR either specifically or generally.<sup>119</sup> It has, for instance, found violations under Article 9 (arbitrary detention).<sup>120</sup> It has also reviewed States' refugee policies under Article 7 to ascertain compliance with *non-refoulement* and compliance with various other articles with respect to refugees and asylum seekers.<sup>121</sup>

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<sup>115</sup> The Universal Periodic Review mechanism, though not a treaty body, has also made numerous recommendations to States under its review relating to refugee rights. See OHCHR, Universal Human Rights Index (search term "refugees"), accessed 27 May 2020, <https://uhri.ohchr.org/en/search/results>.

<sup>116</sup> UN Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), UN Doc HRI/GEN/1/Rev.7, May 12, 2004, at 140 para.2 in James C. Hathaway, *Refugee Rights*

<sup>117</sup> UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, at para.

10 available at: <http://www.refworld.org/docid/478b26ae2.html> [accessed 17 April 2018]

<sup>118</sup> HRC, General Comment No. 20 at para. 9 states: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."

<sup>119</sup> Santhosh Persaud, "Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights, *New Issues in Refugee Research: Research Paper*, no. 132 (Nov. 2006). See recent observations/recommendations from the Universal Human Rights Index (search term "refugees"), accessed 27 May 2020, <https://uhri.ohchr.org/en/search/results>. This includes assessment of compliance with Articles 2, 6 and 13. For relevant jurisprudence from treaty bodies on refugee rights see OHCHR, "Jurisprudence," (search term "refugees"), accessed 27 May, 2020, <https://juris.ohchr.org/search/results>.

<sup>120</sup> Saul Takahashi, "Recourse to Human Rights Treaty Bodies for Monitoring the Refugee Convention," *Netherlands Quarterly of Human Rights* 20, no.1 (2002): 67-69.

<sup>121</sup> Saul Takahashi, "Recourse to Human Rights Treaty Bodies," 66-70.

The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) has a specific provision dealing with *refoulement* and provides one of the most direct means for refugees and asylum seekers through which to claim protection from a treaty body. Article 3(1) states: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Hence, the Convention’s treaty body, the Committee against Torture (CAT) regularly reviews States’ refugee policies to ensure compliance with Article 3.<sup>122</sup> Importantly, the CAT has through the individual communications procedure, provided relief for asylum seekers threatened with *refoulement*.<sup>123</sup>

The Committee on the Rights of the Child has also considered refugee matters relating to children. It recently found that Denmark had violated Articles 3 and 19 of the CRC with respect to an asylum-seeker child faced with the threat of female genital mutilation if returned to Somalia.<sup>124</sup> It has also issued Concluding Observations to States on the situation of refugee and asylum seeker children and encouraged ratification of the two international refugee instruments.<sup>125</sup>

The Committee on the Elimination of Discrimination Against Women (CEDAW) issued a “General Comment on gender-related dimensions of refugee status, asylum,

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<sup>122</sup>Takahashi, 67-68. See also Brian Gorlick, “The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees,” *International Journal of Refugee Protection* 11, no. 3 (1999): 475-495; For a comprehensive source of treaty bodies’ recommendations to State parties see Universal Human Rights Index (search term “refugees”), accessed 27 May, 2020, <https://uhri.ohchr.org/en/search/results>; for a comprehensive source of jurisprudence from treaty bodies see OHCHR, “Jurisprudence,” (search term “refugees”), accessed 28 May, 2020). <https://juris.ohchr.org/search/results>

<sup>123</sup> Takahashi, “Recourse to Human Rights Treaty Bodies,” 67-68.

<sup>124</sup> *A.M. (on behalf of K.Y.M.) v Denmark*, communication No. 3/2016, CRC/C/77/D/3/2016, UN Committee on the Rights of the Child (CRC), 25 January 2018, accessed 18 April 2018, <http://www.refworld.org/cases/CRC,5a7dd3284.html> .

<sup>125</sup> <http://www.refworld.org/publisher/CRC.html> accessed 18 April 2018. For instance the CRC raised the issue of ratification of the 1951 Convention and its Protocol in all three of its Concluding Observations on Lebanon (1996, 2002 & 2006) in Maja Janmyr, “No Country of Asylum: “Legitimizing” Lebanon’s Rejection of the 1951 Refugee Convention,” *International Journal of Refugee Law*, 29, Issue 3 (13 November 2017): 438–465 doi:10.1093/ijrl/eex026 .

nationality and statelessness of women.”<sup>126</sup> This was to ensure that States applied a gender perspective when determining refugee status. The General Comment also introduced sex and gender as additional grounds of persecution and sets specific gender-sensitive standards for the asylum process.<sup>127</sup> CEDAW has also issued Concluding Observations encouraging ratification of the international refugee instruments and the adoption of laws and regulations relating to the status of asylum-seekers and refugees in line with international standards.<sup>128</sup>

NHRIs regularly submit reports to the treaty bodies and in the case of the three treaty bodies mentioned above, have a formal working relationship that extends beyond reporting.<sup>129</sup> These reporting and engagement processes serve to facilitate demands for accountability where States fail to meet their obligations, and to encourage implementation of human rights obligations at the domestic level. McAdams argues that merely acknowledging a nexus between refugee law and human rights law is not sufficient to guarantee comprehensive rights for refugees and asylum seekers.<sup>130</sup> It is necessary that States, over and above submitting themselves to Refugee Conventions, domesticate international human rights obligations.<sup>131</sup> Thus, by encouraging, demanding or advocating for the implementation of human rights obligations at the domestic level, NHRIs can bridge the protection gap that may exist with respect to refugees and asylum seekers.

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<sup>126</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, available at: <http://www.refworld.org/docid/54620fb54.html> [accessed 18 April 2018].

<sup>127</sup> CEDAW, *General recommendation No. 32*, para 13, 30, 38, 50.

<sup>128</sup> See for example, UN doc CEDAW/C/LBN/CO/3 (2008) para 41. UN doc CEDAW/C/LBN/CO/4-5 (2015) paras 11–12. For additional country specific observations see OHCHR, Universal Human Rights Index (search term “refugees”) accessed 27 May, 2020, <https://uhri.ohchr.org/en/search/results>.

<sup>129</sup> CEDAW, CAT CRC and NHRI working methods

<sup>130</sup> Jane McAdams, “The Refugee Convention as a Rights Blueprint...” 4-5

<sup>131</sup> McAdams, 4-5

Additionally, certain human rights treaties provide explicit protection measures for refugees, while in others such protection is implied.<sup>132</sup> Several regional human rights instruments provide protection measures for asylum seekers and refugees. For instance, within the European Union (EU), there is a Common European Asylum System consisting of treaty provisions, regulations and directives that are binding on EU Member States.<sup>133</sup> In the Americas, the 1969 American Convention on Human Rights establishes the right to seek asylum in its Article 22(7).<sup>134</sup> The Inter-American human rights system has also been cited as a possible model for integrating principles of both refugee law and human rights for the protection of refugees and asylum seekers.<sup>135</sup> In Asia, the Association of Southeast Asia Nations (ASEAN) adopted the non-binding ASEAN Human Rights Declaration in 2012.<sup>136</sup> The Declaration recognises, in its Article 16, the “right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.”<sup>137</sup>

In Africa, some of the human rights instruments have provisions explicit to refugees and asylum seekers. Article 23 of the African Charter on the Rights and Welfare of the African Child stipulates special measures for protection of asylum seeking and refugee children, as well as, internally displaced children.<sup>138</sup> Articles 4(2)(k), 10(2)(c) & (d) and 11(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

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<sup>132</sup> For a detailed discussion of how specific human rights standards can be utilised to determine refugee status see James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2<sup>nd</sup> Edition, (Cambridge: Cambridge University Press, 2014).

<sup>133</sup> Mirjana Stankovic, *Compendium of International, Regional and National Legal Instruments on Forced Migration*, The World Bank Group, May 2017.

<sup>134</sup> American Convention on Human Rights.

<sup>135</sup> David James Cantor and Stefania Eugenia Barichello, “The Inter-American human rights system: a new model for integrating refugee and complementary protection?” in *International Journal of Human Rights* 17, Issue 5-6 (2013): 689-706. <https://doi.org/10.1080/13642987.2013.825077>. See also Refugee Law Initiative, Comparative Regional Approaches to Refugee Protection, accessed 4 May, 2018, <https://rli.sas.ac.uk/research-projects/pushing-boundaries/comparative-regional-approaches-refugee-protection>.

<sup>136</sup> ASEAN Member States are: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, accessed 8 May 2018, <http://asean.org/asean/member-states/>.

<sup>137</sup> ASEAN, “ASEAN Human Rights Declaration,” accessed 8 May 2018 <http://asean.org/asean-human-rights-declaration/>.

<sup>138</sup> ACHPR, *African Charter on the Rights and Welfare of the African Child*. (Entered into force November 29, 1999) [http://www.achpr.org/files/instruments/child/achpr\\_instr\\_charterchild\\_eng.pdf](http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf).

Women in Africa are specific to refugee women.<sup>139</sup> Furthermore, the African Charter through Article 12 (3) grants the right to asylum.<sup>140</sup> This has been invoked directly in relation to refugee claims.<sup>141</sup>

In addition, other international and regional human rights mechanisms are now playing an important role in enhancing accountability for refugee protection. This also serves to reinforce the relationship between international refugee law and international human rights law.<sup>142</sup> At the international level, the Commission on Human Rights (replaced by the Human Rights Council in 2006) formally recognized the role of these mechanisms through resolution 1998/49.<sup>143</sup> This resolution requested all UN bodies and agencies to provide the High Commissioner for Human Rights “with information on the situation of refugees and displaced persons, for appropriate action in consultation with, the High Commissioner for Refugees.”<sup>144</sup> The Commission on Human Rights further endorsed the UNHCR’s participation at treaty body sessions and granted the High Commissioner for Refugees standing before the Commission.<sup>145</sup>

At the African regional level, the African Commission has both a protection and promotional mandate. It is mandated to receive both inter-State and individual

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<sup>139</sup> ACHPR, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. (Entered into force November 25, 2005) [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). Kenya and South Africa have ratified the Protocol with reservations.

<sup>140</sup> *African Charter on Human and Peoples Rights*.

<sup>141</sup> Chaloka Beyani “The Role of Human Rights Bodies in Protecting Refugees, Internally Displaced Persons and Migrant Workers,” in *Essays in Memory of Joan Fitzpatrick and Arthur Helton* ed., Anne Fruma Bayefsky (Leiden: Martinus Nijhoff Brill, 2006), 272: The African Commission in 1996, found that Rwanda was in breach of Article 12(3) and Article 2 of the African Charter when it expelled Burundian refugees from its territory. *Organisation Mondiale Contre la Torture and Others v. Rwanda* (Comm. Nos. 27/89, 46/91, 49/91, 99/93) 20<sup>th</sup> Ordinary Session of the African Commission 21-31 October 1996. Similarly, the Inter-American Commission on Human Rights found the United States to have breached the right to asylum in its interdiction of Haitian refugees in the high seas. *Haitian Interdiction (United States)*, Case 10.675, Report No. 51/96, Judgement of 13 March 1997, Inter-Am.C.H.R. OEA/Ser.L/V/ii/95 Doc. 7 rev (1997) at 550.

<sup>142</sup> Chaloka Beyani, “The Role of Human Rights Bodies,” 271.

<sup>143</sup> UN Res 1998/49 adopted on 17 April 1998.

<sup>144</sup> Chaloka Beyani, 272.

<sup>145</sup> Chaloka Beyani, “The Role of Human Rights Bodies,” 272.



communications and has considered refugee matters.<sup>146</sup> It has also utilised its broad promotional mandate to undertake activities in relation to refugees, asylum seekers and displaced persons.<sup>147</sup> The Commission considers States reports and has exercised its powers to call for State adherence to Convention standards of protection for refugees and asylum seekers.<sup>148</sup> In addition, the Commission convenes conferences or seminars on refugee matters, builds working relationships for enhancing refugee protection on the continent and undertakes research.<sup>149</sup> The Commission also adopts country-specific and thematic resolutions on refugees, to draw attention to their plight and to highlight the need for States to extend special measures of protection to refugees.<sup>150</sup>

To supplement its role further, the Commission created the office of the Special Rapporteur on the rights of refugees, asylum seekers, internally displaced persons and migrants.<sup>151</sup> As a result, issues pertaining to refugees and asylum seekers have been given greater visibility within the African human rights system. The Commission also signed a Memorandum of Understanding with the UNHCR with the intention to enhance the protection of the rights of refugees in Africa.<sup>152</sup> Additional mechanisms that can play an important role include the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. While these institutions have

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<sup>146</sup> Michael Addaney, Moving the Debate Forward: Securing the Rights of Refugees under the African human Rights System," in Michael Addaney & Michael Gyan Nyarko eds, *Ghana @ 60: Governance and Human Rights in Twenty-First Century Africa*, Pretoria University Law Press, 2017:291-294; Gina Bakker, "The Protection of Asylum Seekers and Refugees within the African regional human rights system," *African Human Rights Law Journal* 13 (2013): 9-20.

<sup>147</sup> Gina Bakker, "The Protection of Asylum Seekers," 20-24. See also Michael Addaney, 293

<sup>148</sup> Gina Bakker, 20-24; Michael Addaney, 293

<sup>149</sup> African Charter, Articles 45(1)(a), (b) and (c).

<sup>150</sup> See e.g. Resolution on Human and Peoples' Rights Education, ACHPR/Res.6 (XIV) 93; Resolution on the Human Rights Situation in Africa, ACHPR/Res.14 (XVI) 94; Resolution on Sudan, ACHPR/Res.15 (XVII) 95; Resolution on Burundi, ACHPR/Res.24 (XIX) 96; Resolution on the Observance of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugees in Africa (1999), ACHPR/Res.43 (XXVI) 99; Resolution On Darfur, ACHPR/Res.68 (XXXV) 04; Resolution on Migration and Human Rights, ACHPR/Res.114 (XXXXII) 07; Resolution on the Human Rights Situation in Côte d'Ivoire, ACHPR/Res.182(EXT.OS/IX)2011; Resolution on the Situation of the North of the Republic of Mali, ACHPR/Res.217 (XXXXXI)2012; and Resolution on the Right to Nationality, ACHPR/Res.234 (2013).

<sup>151</sup> Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res.72 (XXXVI)

<sup>152</sup> ACHPR, Memorandum of Understanding between ACHPR and the UNHCR, 2012, accessed 28 May 2020 <https://www.achpr.org/presspublic/publication?id=23>

laid the groundwork for refugee protection within Africa, the effective protection for refugees through these institutions remains limited - largely due to institutional and implementation weaknesses.<sup>153</sup> In addition, there is limited evidence to indicate that these mechanisms and procedures engage substantively with NHRIs.<sup>154</sup>

As noted earlier, treaty bodies have played an important role in strengthening the protection of refugees, as well as the development of the inter-relationship between human rights and refugee law. Their jurisprudence, Concluding Observations and General Comments are also important for refugee protection where a State is not party to a specific refugee instrument, but is party to a human rights instrument. However, there are challenges that these mechanisms face that may limit the extent to which they can contribute to the refugee protection.

For instance, the CAT, which has dealt with the largest number of asylum-related claims, and has thus contributed immensely to jurisprudence relating particularly to *non-refoulement* and prohibition of torture, is overburdened and underfunded.<sup>155</sup> Therefore, as Gorlick concludes, it may be unable to deal with claims effectively and expeditiously, to the detriment of vulnerable individuals and the integrity of the human rights system.<sup>156</sup> There are also procedural and evidentiary issues that may arise that could hinder the development of human rights law and refugee law.<sup>157</sup> Other human rights mechanisms face similar challenges. Perhaps the most compounding challenge is that the treaty bodies do not have the specialist expertise in refugee law and jurisdictional mandate to interpret the 1951

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<sup>153</sup> Gina Bakker, "The Protection of Asylum Seekers," 20-24.

<sup>154</sup> For instance, none of the reports of the Special Rapporteur on the rights of refugees, asylum seekers, internally displaced persons and migrants makes reference to or suggests recommendations for NHRIs' engagement with the rights of these groups of persons.

<sup>155</sup> Brian Gorlick, "The Convention and the Committee Against Torture," 491.

<sup>156</sup> Brian Gorlick, 491.

<sup>157</sup> Gorlick, "The Convention and the CAT, 491. For instance, treaty bodies may adopt restrictive application of the rules of procedure and the adoption of higher evidentiary burdens to cope with a higher volume of individual communications.

Convention.<sup>158</sup> Therefore, their role while important may be that of a stopgap measure as suggested in this conclusion from an expert workshop sponsored by UNHCR:<sup>159</sup>

It is a narrow interpretation of the 1951 Convention, which is driving, rejected asylum seekers to human rights treaty bodies, and there would be no need for asylum seekers to have recourse to CAT and other such mechanisms if States honoured the spirit of their obligations under the refugee instruments.<sup>160</sup>

Focus then should be on enhancing ways to change policy and practice at the domestic level, as this is where international norms and standards are given effect. This provides important possibilities for national human rights institutions and based on the discussion above, NHRIs can creatively utilise human rights law to enhance the effective realisation of refugee rights.

### **3.7 Challenges: Normative and implementation gaps**

Discussions on the challenges of international refugee law have been on-going for decades. In 1983, the UNHCR noted that the principles of international protection needed to be "strongly reaffirmed, effectively implemented and, where necessary, further developed."<sup>161</sup>

Commenting in 1997, Hathaway one of the leading refugee law scholars, declared international refugee law to be in a state of crisis and proposed ways through which it could be enhanced.<sup>162</sup> However, beyond the increased use of human rights mechanisms for refugee protection, there has been limited development to strengthen the international refugee protection regime. The result is that both normative and implementation gaps within international refugee law remain. Some of the main gaps are discussed below.

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<sup>158</sup> Katie O'Byrne, 'Is there a Need for Better Supervision of the Refugee Convention?' *Journal of Refugee Studies* 26, (2013): 342.

<sup>159</sup> Takahashi, "Recourse to Human Rights Treaty Bodies," 67-69.

<sup>160</sup> UNHCR, *Summary Report of the Expert Workshop on Human Rights and Refugees, 'Human Rights Violations, Persecution and Non-state Agents'*, Athens, 18-20, December 1998 in Gorlick, "The Convention and the CAT, 491.

<sup>161</sup> UNHCR, *Note on International Protection* 27, UN. Doc. A.AC.96/623 (31 July 1983).

<sup>162</sup> James C. Hathaway, *The Rights of Refugees*, 94.

### 3.7.1 Normative gaps

The scope of application of the 1951 Refugee Convention remains persons whose claim for protection is based on persecution on the five grounds contained in Article 1. These are race, religion, nationality, membership of a particular social group, and political opinion.<sup>163</sup> The Convention is silent on the content of these grounds. It also does not provide a definition for “persecution”. The absence of the meaning of some of its key terms has rendered some of its provisions ambiguous.<sup>164</sup> State practice has led in some instances, to narrow or inconsistent interpretation of the Convention’s provisions because of such ambiguities.<sup>165</sup> The consequence is that persons fleeing their countries, and who may be in need of international protection, are excluded from such protection.<sup>166</sup>

The circumstance under which forced displacement occurs has changed significantly since the Convention was drafted. Forced displacement more often occurs because of conflict or generalised violence that may not necessarily include a “well-founded fear of persecution.”<sup>167</sup> There is also difficulty in claiming protection based on environmental or natural disasters.<sup>168</sup> Yet, there are increasing numbers of people who are forcibly displaced across borders due to environmental causes.<sup>169</sup> Moreover, there are cases where refugee status has been granted on claims on grounds not included in the Convention definition. These

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<sup>163</sup> Hathaway, *The Rights of Refugees*, 94.

<sup>164</sup> Hathaway, *The Rights of Refugees*, 94.

<sup>165</sup> Hathaway, 94; See also Cathryn Costello, Yulia Ioffe and Teresa Büchsel, “Article 31 of the 1951 Convention Relating to the Status of Refugees,” *Legal and Protection Policy Research Series*, July 2017; Shirley Llian Arenilla, “Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States,” *Anuario Mexicano de Derecho Internacional* 15, Issue 1 (2015): 283-322, <https://doi.org/10.1016/j.amdi.2014.09.005>; M. Jane Kronenberger, “Refugee Women: Establishing a Prima Facie Case under the Refugee Convention,” *ILSA Journal of International Law* 15 (1992): 61-84; Ellen F. D'Angelo, “Non-Refoulement: The Search for a Consistent Interpretation of Article 33,” *Vanderbilt Journal of Transnational Law* 42, no. 1 (January 2009): 279-316

<sup>166</sup> Volker Turk and Rebecca Dowd, “Protection Gaps,” in *The Oxford Handbook for Refugee and Forced Migration Studies* eds. Elena Fiddian-Qasimiyeh, Gil Loescher, Katy Long and Nando Sigona (Oxford: Oxford University Press, 2015), 4.

<sup>167</sup> Joan Fitzpatrick, “Revitalising the 1951 Convention” in *Harvard Human Rights Journal* 9 (Spring 1996): 229-253.

<sup>168</sup> Volker Turk and Rebecca Dowd, “Protection Gaps,” 7.

<sup>169</sup> Turk and Dowd, 7.

include on grounds of gender-based violence such as female genital mutilation,<sup>170</sup> and sexual orientation and gender identity.<sup>171</sup> Women have also been recognized in some cases as belonging to a particular social group and can claim refugee status accordingly.<sup>172</sup> However, these cases are few and are based on a State's discretion in the interpretation of the refugee definition.<sup>173</sup>

To a certain extent, the African refugee protection regime does fill these gaps. The African regime provides standards of treatment for refugee women and children as vulnerable groups, through provisions in the region's key human rights instruments.<sup>174</sup> The 1969 Refugee Convention also fills the normative gap for persons fleeing situations of generalized violence, which is not covered under the 1951 Convention.

The 1951 Convention is also silent on the treatment of asylum seekers, as it does not cover the right of asylum. It only applies to those who have qualified as refugees. As Turk and Dowd point out, it does not cover the process of admission to territory or access to asylum procedures, even though some of its fundamental protections apply to asylum seekers.<sup>175</sup> States have to define these processes based on their own interpretation. This has also resulted, as mentioned above, in States having a wide discretion in determining who qualifies for refugee status. For instance, a number of States have refused to accept into their territories asylum seekers who arrive by boat.<sup>176</sup> States have argued that the 1951 Convention only applied once the asylum seeker had arrived within the territory of a State party.<sup>177</sup> This narrow interpretation of the Convention's provisions is a growing trend. Many States are

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<sup>170</sup> Joan Fitzpatrick, "Revitalising the 1951 Refugee Convention."

<sup>171</sup> Turk and Dowd, "Protection Gaps," 7.

<sup>172</sup> Turk and Dowd, "Protection Gaps," 7.

<sup>173</sup> Turk and Dowd, 7.

<sup>174</sup> See discussion above on the African regional protection regime

<sup>175</sup> Turk and Dowd, "Protection Gaps," 7.

<sup>176</sup> In the 1980s with respect to Indo-Chinese refugees (boat people) and Australia's policy of intercepting and turning away boats with asylum seekers in the high seas.

<sup>177</sup> Guy S. Goodwin-Gill, *International Law of Refugee Protection*, 36.

adopting restrictive measures to deal with refugees and asylum seekers.<sup>178</sup> Such measures are often justified under the pretext of national security concerns with little regard to Convention obligations or the character of the Convention.<sup>179</sup>

In addition, the Convention does not provide standards for realization of durable solutions.<sup>180</sup> To date, the 1969 AU Refugee Convention remains the only source of hard law on voluntary repatriation, local integration and resettlement.<sup>181</sup> In the absence of such legal standards, “States have forcibly returned refugees to their countries of origin without any guarantees as to their treatment upon return.”<sup>182</sup> Additional normative gaps include, inter alia, that the convention does not address general non-discrimination, immigration detention, and the right to family life and burden sharing.<sup>183</sup>

### 3.7.2 Implementation gaps

Under international human rights law, treaty bodies play the primary supervisory and enforcement role to promote State compliance with treaty provisions. This is done through examination of State party reports submitted to the relevant treaty body. This system has evolved to include important oversight roles for the other mechanisms such as the special Procedures, and the Human Rights Council. However, as mentioned briefly in Chapter 1, the 1951 Refugee Convention did not establish an independent expert supervisory body to oversee its implementation or receive individual complaints.<sup>184</sup>

<sup>178</sup> UNHCR, *Open Briefing by Volker Türk, Assistant High Commissioner for Protection presented to the United Nations Security Council Counter-Terrorism Committee*, New York, UNHCR, 5 April 2017. [https://www.un.org/sc/ctc/wp-content/uploads/2017/04/UNHCR-Speech\\_Asylum-Briefing-5-April-2017.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2017/04/UNHCR-Speech_Asylum-Briefing-5-April-2017.pdf)

<sup>179</sup> UNHCR, *Open Briefing by Volker Türk*.

<sup>180</sup> Guy S. Goodwin-Gill, *International Law of Refugee Protection*, 42.

<sup>181</sup> Goodwin-Gill, *International Law of Refugee Protection*, 43.

<sup>182</sup> Cristiano d’Orsi, *Asylum Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven*, (New York: Routledge, 2016), 271. Tanzania forcibly returned Burundian refugees and Kenya has also expelled Somali refugees from its territory.

<sup>183</sup> Turk and Dowd, “Protection Gaps,” 7; Meltem Ineli-Ciger, “Protection Gaps and Temporary Protection,” *Max Planck Yearbook of United Nations Law*, 20, 2016, 418–425.

<sup>184</sup> James Crawford cited in James C. Hathaway (2005) *ibid* p 994 noted that the universal approach to human rights treaty implementation is predicated on the establishment of a specialist supervisory body not of a judicial or quasi-judicial character, with regular reporting obligations leading to dialogue between States and the supervisory body. He adds that the capacity to receive individual complaints is a necessary characteristic of such a supervisory body. James Crawford “The UN Human Rights Treaty System: A System in Crisis” in *The Future*

The supervisory role was mandated to the UNHCR under Article 35 of the Convention. It obliges States party “to co-operate with UNHCR, or any other agency of the UN which may succeed it, in its exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”<sup>185</sup> The UNHCR has however, not given full effect to this role.<sup>186</sup> For example, it has not provided an interpretation of its supervisory role as prescribed under Article 35.<sup>187</sup> It has also not developed a conceptual framework on what its supervisory role entails.<sup>188</sup> Thus, there are no guidelines for States on the content of their obligation to “facilitate” the UNHCR’s supervision of the two treaties.

Barutciski suggests that the UNHCR’s reluctance to give full effect to Article 35 rests largely on States’ reservation to submit to a rigorous supervisory international mechanism.<sup>189</sup> He argues that this is largely due to States’ perception that refugee protection can affect fundamental aspects of territorial sovereignty.<sup>190</sup> He further notes that the UNHCR often has to collaborate with States, which are reluctant hosts.<sup>191</sup> As such, the UNHCR has focused on a diplomatic approach to reach political consensus on international refugee protection, to the exclusion of a confrontational approach that a fully operationalized Article 35 may present.<sup>192</sup>

Additionally, there are no time frames for States’ periodic and regular reporting about the implementation of the Convention, or the condition of refugees within their territories. While the UNHCR formally requested information from State parties in 1990, the response

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of *UN Human Rights Treaty Monitoring*, eds. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 1-2.

<sup>185</sup> *Convention Relating to the Status of Refugees*.

<sup>186</sup> James Hathaway and R. Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,” *Harvard Human Rights Journal* 10, (1997): 149.

<sup>187</sup> Hathaway and Neve, “Making International Refugee Law,” 149.

<sup>188</sup> Hathaway and Neve, 149.

<sup>189</sup> Michael Barutciski, “The Limits to UNHCR’s Supervisory Role,” in *The UNHCR and the Supervision of International Refugee Law* ed., James Simeon (Cambridge: Cambridge University Press, 2013), 59-74

<sup>190</sup> Michael Barutciski, “The Limits to UNHCR’s Supervisory,” 67-69

<sup>191</sup> Barutciski, 67-69.

<sup>192</sup> Barutciski, 67-69.

was poor with only 23 State Parties responding by the 31 December 1991 deadline.<sup>193</sup> The UNHCR has not made additional requests despite the adoption of subsequent EXCOM conclusions and Commission on Human Rights' resolutions on State reporting under Article 35.<sup>194</sup>

Furthermore, the UNHCR does not have the mandate to sanction States when they adopt laws that contravene or fail to incorporate international refugee norms and standards,<sup>195</sup> for instance, determining asylum seekers to be "illegal" in contravention to Article 31 of the Convention.<sup>196</sup> The UNHCR has at times raised concerns and issued statements criticising such laws or State (in) action, but not in a consistent manner.<sup>197</sup> Furthermore, unlike some treaty bodies, the UNHCR does not have the authority to handle complaints concerning non-compliance with either the 1951 Refugee Convention or its protocol.<sup>198</sup> The UNHCR may bring such matters to the attention of its Executive Committee, the Human Rights Council, the ECOSOC or the General Assembly.<sup>199</sup> However, the conclusions or resolutions that may result, are not binding on States.<sup>200</sup> It remains up to the States to determine the level, if any, of compliance.

At the international level, the International Court of Justice (ICJ) may provide a possible avenue for enforcement. Pursuant to Article 65 of the ICJ Statute, the UNHCR can approach the ICJ for an advisory opinion related to the interpretation of provisions of the 1951 Refugee Convention. However, the UNHCR has never requested such an opinion from

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<sup>193</sup> UNHCR, *Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, EC/SCP/66, 22 July 1991 (UN Doc. EC/SCP/66) para. 3.

<sup>194</sup> ExCom Conclusion 77 (XLVI) 1995, General Conclusion on International Protection at para. e. and Commission on Human Rights Human Rights and Mass Exoduses, 1996/51 and 1997/75 respectively.

<sup>195</sup> James Hathaway, Anthony North, James M. Pobjoy, "Supervising the Refugee Convention," 324.

<sup>196</sup> James C. Hathaway, "The Rights of Refugees, 173-186-discussing lawful presence under Article 31

<sup>197</sup> Saul Takahashi, "Recourse to Human Rights Treaty Bodies," 62.

<sup>198</sup> Takahashi, "Recourse to Human Rights Treaty Bodies," 62.

<sup>199</sup> Takahashi, 62.

<sup>200</sup> James Hathaway, Anthony North, James M. Pobjoy, "Supervising the Refugee Convention," 324.



the ICJ.<sup>201</sup> Alternatively, States can bring a dispute to the ICJ that relates to the interpretation of application of the Convention. This is provided for under Article 38 of the 1951 Refugee Convention. Article 38 has yet to be invoked by any State.<sup>202</sup> At the African regional level, the African Commission and the African Court on Human and Peoples' Rights offer possible avenues for enforcement of refugee law.<sup>203</sup>

Another key challenge with the international refugee law framework is that UNHCR does not have the mandate to authoritatively decide on the meaning of the treaty.<sup>204</sup> The 1951 Refugee Convention does not provide a mechanism to develop new standards.<sup>205</sup> The EXCOM is the only body at the international level that pronounces on standards.<sup>206</sup> Nevertheless, as discussed above, these are not binding on States. This gap has led States to develop principles that do not necessarily reflect the humanitarian and human rights character of refugee protection.<sup>207</sup>

Terms such as “safe third country” and “first country of asylum” have been adopted. For instance, such terms are being utilised without a clear basis under international refugee law within the EU to check the number of refugees arriving within the EU.<sup>208</sup> In some instances, the adoption of such measures has led to violations of the Convention.<sup>209</sup> The EU

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<sup>201</sup> Hathaway, North, Pobjoy, 324.

<sup>202</sup> Hathaway, North, Pobjoy, 323-6; James C Hathaway, *The Rights of Refugees*, 994.

<sup>203</sup> The ACHPR has heard cases related to refugees for instance: ACHPR, *John D. Ouko v Kenya*, 232/99 (2000), accessed 25 January, 2020, <https://www.achpr.org/sessions/descions?id=129>; *Organisation Mondiale Contre La Torture and Others v Rwanda*; *Mouvement Des Refugies Mauritaniens Au Senegal v Senegal* 162/97 (1997), accessed 25 January 2020, <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1997/4>; *African Institute For Human Rights And Development v Guinea*, 249/2002 [2004], <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2004/59>, accessed 25 January, 2020.

<sup>204</sup> James Hathaway, Anthony North, James M. Pobjoy, “Supervising the Refugee Convention,” 324.

<sup>205</sup> Hathaway, North, Pobjoy, 324.

<sup>206</sup> Katie O’Byrne, “Is there a Need for Better Supervision of the Refugee Convention?” 339.

<sup>207</sup> Katie O’Byrne, “Is there a Need,” 339.

<sup>208</sup> For a detailed discussion on the use of such mechanisms to prevent potential refugees from entry see James C Hathaway, *The Rights of Refugees*, 291-300.

<sup>209</sup> James C Hathaway, *The Rights of Refugees*, 298; See Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation*, (London: Routledge, 2012).

also adopted a limitation to the definition of a refugee to mean third country nationals.<sup>210</sup> As such, EU Member State nationals cannot claim to be a refugee as the refugee status within the EU is limited to persons from non-EU Member States.<sup>211</sup> International refugee law does not provide for such limitation.<sup>212</sup> The UNHCR has done little to prevent States from implementing such practices, and has in some instances assisted States to implement or pursue such measures.<sup>213</sup>

Additionally, both the 1951 Convention and its 1967 Protocol have not been acceded to all States. As at February 2020, forty-seven countries were yet to become parties to one or both treaties.<sup>214</sup> This means that the basic legal instruments for international refugee protection are yet to become universally applicable. Some African countries are only party to the 1969 Refugee Convention and therefore, are only bound by the regional instrument.<sup>215</sup> However, non-ratification of either treaty does not imply that States cannot protect refugee rights in practice. The problem that arises is that the State is not obliged to comply with the

<sup>210</sup> EC, “Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Art. 2(c), 2004/83, 2004 O.J. (L. 304) 12 (EC).” EC, 2004.

<sup>211</sup> EC, “Council Directive on minimum standards.”

<sup>212</sup> EC, “Council Directive on minimum standards.”

<sup>213</sup> James C Hathaway, *The Rights of Refugees*, 294, 297, 299. For example, UNHCR signed a *refoulement* agreement with Tanzania in 1996 to repatriate Rwandan refugees, many of whom were unwilling to return to Rwanda. See Beth Elise Whitaker, ‘Changing priorities in Refugee Protection: The Rwandan Repatriation from Tanzania,’ *Working Paper No. 53*, accessed 7 May 2018. <http://www.refworld.org/pdfid/4ff54fd22.pdf>. The UNHCR argued in this and other cases that the actions were in the pursuit of a “least worst option.” See UNHCR, *Remarks by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the United Nations Security Council, New York, 28 April 1997*, accessed 7 May 2018 <http://www.unhcr.org/afr/admin/hcspeeches/3ae68fbb1c/remarks-mrs-sadako-ogata-united-nations-high-commissioner-refugees-united.html>. UNHCR has in some instances implemented a ‘right to remain’ (which does not have a legal basis under international refugee law) for instance when Turkey closed its borders in 1991 preventing Kurdish refugees from Iraq accessing its territory and providing assistance to IDPs in the former Yugoslavia which some commentators argues was the UNHCR serving governments interests in containing burdensome refugee flows.

<sup>214</sup> UNHCR, *States Party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, accessed 15 April 2018, <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>. The most recent ratification was Nauru in 2011

<sup>215</sup> AU, “List of Countries which have Signed, Ratified/Acceded to the OAU Convention Governing The Specific Aspects of Refugee Problems in Africa,” AU, accessed 30 January 2020 <https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>. These are Comoros, Eritrea, Libya, Mauritius, Sahrawi, South Sudan and Tanzania; Compared against, UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol,” UNHCR, accessed 30 January, 2020. <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

minimum international refugee law standards, and it may have fewer incentives to give such standards domestic effect.

The UNHCR is mandated to encourage the ratification of refugee instruments, but there has been little success, particularly in Asia including the Middle East.<sup>216</sup> According to the UNHCR, the three countries hosting some of the largest refugee populations are in Asia, but none is party to either one of the refugee treaties.<sup>217</sup> Thus, the effectiveness of the domestic refugee frameworks may be severely limited in these States. Generally, these States accept asylum seekers because of porous borders.<sup>218</sup> The UNHCR, where present, then has to negotiate an agreement with the State to determine how it can provide international protection and assistance to refugees and asylum seekers.<sup>219</sup> Besides support from the UN agencies and other humanitarian actors, such States would have to determine how to provide support to refugees and asylum seekers. However, because of the mass influx of asylum seekers into Europe, there is now renewed interest among States for responsibility sharing for refugees.<sup>220</sup>

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<sup>216</sup> Of the fifty-one States not party to the Refugee Conventions, nearly all are from Asia-Pacific and the Middle East. See <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

<sup>217</sup> These are Lebanon (949,700), Pakistan (1.4 million) and Jordan (715,300) Source: UNHCR, *Figures at a Glance*, accessed 15 April 2018. <https://www.unhcr.org/5d08d7ee7.pdf>.

<sup>218</sup> See for example Myron Weiner, "Rejected Peoples and Unwanted Migrants in South Asia." *Economic and Political Weekly*, 1743, 34th ed. Vol. 28. 1993 in Sreya Sen, "Understanding India's Refusal to Accede to the 1951 Convention: Context and Critique," in *Refugee Review: Re-conceptualising Refugees and Forced Migration in the 21<sup>st</sup> Century*, May 28, 2015. [https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/#\\_ftn12](https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/#_ftn12).

<sup>219</sup> For instance, in the United Arab Emirates (UAE), the UNHCR operates under the UNDP, as there is no legal framework to govern the relationship between UNHCR and the Government of the United Arab Emirates. In Jordan, the UNHCR signed a memorandum of understanding with the Government, which allows the UNHCR to act within its mandate to provide international protection to persons falling within its mandate. This MOU has become the legal framework under which refugees are treated and processed in Jordan by the UNHCR. In practice, Jordan prefers to refer to Arab refugees such as Syrians and Iraqis as "visitors", "irregular guests", "Arab brothers" or simply "guests", which has no legal meaning under domestic laws in International Labour Organization, *Access to Work for Syrian Refugees in Jordan: A Discussion Paper on Labour and Refugee Laws and Policies* 11–12 (2015), <https://data.unhcr.org/syrianrefugees/download.php?id=8919>; Volker Turk, "UNHCR's Supervisory Role," *New Issues in Refugee Research, Working Paper no. 67*: 8-9.

<http://www.unhcr.org/research/working/3dae74b74/unhcrs-supervisory-responsibility-volker-turk.html>

<sup>220</sup> UNHCR, "Sharing responsibilities for large refugee movements: *Statement by Ariane Rummery, UNHCR Spokesperson*," Geneva. UNHCR, 7 July 2017. <http://www.unhcr.org/news/briefing/2017/7/595f41694/sharing-responsibilities-large-refugee-movements.html>

In the case of Jordan, the EU concluded an agreement, referred to as the Jordan Compact, to assist Jordan with hosting refugees and asylum seekers.<sup>221</sup> This agreement has been criticised for its limited consultation with refugees, humanitarian agencies, and civil society organisations.<sup>222</sup> Nevertheless, it provides a basis for consideration of multi-stakeholder responsibility sharing arrangements for refugees.<sup>223</sup> At the international level, the Global Compact on Refugees aims at ensuring effective responsibility sharing among UN Members States regardless of their ratification of the Refugee Conventions.<sup>224</sup> Its primary limitation is that it is not binding on States, but rather reflects a consensus on how to improve the refugee situation. It includes an emphasis on promoting refugee self-reliance.<sup>225</sup>

From the above discussion, it is apparent that the challenges with implementation of treaty obligations, often cited with respect to human rights treaties, equally apply to the 1951 Refugee Convention. This is both in terms of State compliance with treaty obligations and interpretation of the content of the obligations. It is in this regard that NHRIs can play an important role with respect to encouraging State compliance with the Refugee Conventions within the opportunities provided by treaty bodies.

The Human Rights Committee in its General Comment 31 provides an important basis for this to occur. General Comment 31 sets out the nature of the general legal obligation imposed on States Parties. It provides that “the enjoyment of Covenant rights is not limited to

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<sup>221</sup> European Commission, “EU-Jordan Partnership: The Compact, 2016 (Jordan Compact),” accessed 8 May, 2018. <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/jordan-compact.pdf>; *The Jordan Compact: A New Holistic Approach between the Hashemite Kingdom of Jordan and the International Community to deal with the Syrian Refugee Crisis*

<https://reliefweb.int/report/jordan/jordan-compact-new-holistic-approach-between-hashemite-kingdom-jordan-and>

<sup>222</sup> Veronique Barbelet, Jessica Hagen-Zanker and Dina Mansour-Ille, *The Jordan Compact: Lessons Learnt and Implications for Future Refugee Compacts*, Feb 2018, <https://www.odi.org/publications/11045-jordan-compact-lessons-learnt-and-implications-future-refugee-compacts>

<sup>223</sup> For a discussion on past proposals for responsibility sharing see Volker Türk, Madeline Garlick, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees,” *International Journal of Refugee Law* 28, Issue 4 (1 December 2016): 656-678, <https://doi.org/10.1093/ijrl/eww043>; Patrick Wall, “A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?” *International Journal of Refugee Law* 29, Issue 2 (1 June 2017): 201-237, <https://doi.org/10.1093/ijrl/eex025>

<sup>224</sup> UN, *Global Compact on Refugees*, accessed 7 May, 2018. <https://refugeesmigrants.un.org/refugees-compact>

<sup>225</sup> UN, *Global Compact on Refugees*.

citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”<sup>226</sup> Thus, on the basis of this interpretation of States’ obligations under the ICCPR, NHRIs can through domestic engagement with the State, shadow reporting and other modalities of engagement with the HRC, pay particular attention to advocating for the effective realisation of refugee rights.

Despite having traditionally focused their activities on the promotion and protection of human rights broadly, there are examples of NHRIs that consider refugee protection essential to their functions. There are good practices from the field, which interestingly feature NHRIs from the Asia Pacific, the region with the highest number of States that are not party to the Refugee Conventions or many human rights treaties. For example, the Australian Human Rights Commission (AHRC) has since its inception in 1980, dealt with refugee matters.<sup>227</sup>

The AHRC has attributed its engagement on refugee matters to Australia’s restrictive policies on refugees and asylum seekers and the resultant challenges.<sup>228</sup> Of particular concern, is the use of detention for all asylum seekers in contravention to Article 31 of the 1951 Refugee Convention.<sup>229</sup> The AHRC has, for instance, found that the Australian government’s detention of child asylum seekers contravened the Convention on the Rights of the Child and deemed other asylum detention practices arbitrary and contrary to the

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<sup>226</sup> OHCHR, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting) CCPR/C/21/Rev.1/Add. 1326 May 2004 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3D%3D> (accessed 30 May 2020)

<sup>227</sup> Carver, “Refugees and National Human Rights Institutions,” 217-218.

<sup>228</sup> Carver, 218.

<sup>229</sup> Carver, 218-219.

International Covenant on Civil and Political Rights.<sup>230</sup> Its findings led to the amendment to Australia's Migration Act and changes to the detention of asylum seekers.<sup>231</sup>

The Malaysian National Human Rights Commission (SUHAKAM), which is empowered only to protect constitutional rights, has treated the protection of refugee rights as a fundamental aspect of its activities.<sup>232</sup> Despite Malaysia not being party to either of the Refugee Conventions or most of the core human rights treaties, SUHAKAM has successfully argued that Malaysia has international human rights obligations.<sup>233</sup> For example, it has argued that the principle of *non-refoulement* is customary international law and hence, applies to Malaysia despite its failure to ratify the refugee conventions.<sup>234</sup> It also argues that the principle of non-discrimination in the Universal Declaration of Human Rights protects the rights of refugees.<sup>235</sup> In addition, it applies the CRC and CEDAW, to which Malaysia is party, as additional grounds for the protection of refugee rights.<sup>236</sup> It has also succeeded in securing access to places of detention for the UNHCR.<sup>237</sup>

The National Human Rights Commission of India (NHRC) has consistently engaged in the protection of refugee rights in India.<sup>238</sup> This is despite the absence of a formal legal framework for refugees in India. Its interventions have mostly been through the complaints

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<sup>230</sup> Carver, 218-219.

<sup>231</sup> Carver, 219.

<sup>232</sup> Richard Carver, 219; Catherine Renshaw, Andrew Byrnes, and Andrea Durbach, "Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia," *Asian Journal of International Law* 1, no.1 (2011): 165-198; Richard Carver, "A New Answer," 1-32; Mohd Hamdan Adnan, "Refugee Issues In Malaysia: The Need for a Proactive, Human Rights Based Solution," *Malaysian Journal on Human Rights*, 6 (2012): 24-31; Shaila Koshy, "Suhakam urges Malaysia to recognise rights of refugees," *Nation*, 27 November, 2015. <https://www.thestar.com.my/news/nation/2015/11/27/suhakam-urges-malaysia-to-recognise-rights-of-refugees> .

<sup>233</sup> Of the nine core human rights instruments, Malaysia is party to three: the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child (and its two Optional Protocols) and the Convention on the Rights of Persons with Disabilities, accessed 3 May 2018, [http://www.un.org.my/un\\_treaties.aspx](http://www.un.org.my/un_treaties.aspx).

<sup>234</sup> APF, "SUHAKAM calls for government to ratify refugee convention," 9 November 2019, <https://www.asiapacificforum.net/news/suhakam-calls-government-ratify-refugee-convention/> .

<sup>235</sup> Richard Carver, "Refugees and National Human Rights Institutions," 219

<sup>236</sup> Richard Carver, 219.

<sup>237</sup> Carver, 219.

<sup>238</sup> Brian Gorlick and Sumbul Rizvi Khan, "Refugee Protection as Human Rights Protection: International Principles and Practice in India," in *Refuge* 16, 6 (Dec 1997): 39-44.

handling function discharged through the courts or through investigations.<sup>239</sup> Issues that the NHRC dealt with included the right to life and liberty, illegal detention and improvement of conditions of encampment for refugees.<sup>240</sup>

Several African NHRIs have also actively contributed to refugee protection. These include the Commission of Human Rights and Administrative Justice of (CHRAJ), the Uganda Human Rights Commission (UHRC), the South African Human Rights Commission and the Kenya National Commission on Human Rights Commission.<sup>241</sup> Their activities have comprised policy development, legislation drafting, visiting places of detention and strategic litigation.<sup>242</sup> These activities indicate awareness among NHRIs of the need to engage in refugee protection. It also highlights their potentially pivotal role in the promotion and protection of refugee rights and the rights of other vulnerable groups.

Other implementation gaps result from the manner in which the UNHCR operates. The UNHCR has transformed from an institution that primarily provided international protection to refugees, to one that provides humanitarian assistance.<sup>243</sup> As a result, its presence in countries of origin to provide humanitarian aid has increased considerably.<sup>244</sup> States have driven this shift in UNHCR's role by urging the organisation to provide international assistance in a manner, which will reduce movements out of territories.<sup>245</sup> Consequentially, in regions with large refugee crises, the UNHCR is now the means through which assistance to displaced persons is delivered on the ground.<sup>246</sup> This humanitarian work, though sanctioned by both States and the UNHCR, is operationalized beyond its mandate.<sup>247</sup>

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<sup>239</sup> Brian Gorlick and Sumbul Rizvi Khan, "Refugee Protection as Human Rights," 41-42.

<sup>240</sup> Gorlick and Khan, 41-42

<sup>241</sup> Elina Steinerte, "The African National Human Rights Institutions," 87-112.

<sup>242</sup> Steinerte, 101-108.

<sup>243</sup> Guy S Goodwin-Gill, "Refugee Identity and Protection's Fading Prospect," in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999), 224-234. David Kennedy, "International Refugee Protection."

<sup>244</sup> Guy S Goodwin-Gill, "Refugee Identity and Protection's Fading," 224-234.

<sup>245</sup> Guy S Goodwin-Gill, 224-234.

<sup>246</sup> James C Hathaway, *The Rights of Refugees*, 996.

<sup>247</sup> Guy S. Goodwin-Gill, "Refugee Identity and Protection's Fading," 234.

This role is formally mandated to the UN Office of the Coordinator of Humanitarian Affairs (OCHA), but UNHCR is now commonly considered the lead humanitarian agency within the UN system.<sup>248</sup> Organisations such as the International Committee of the Red Cross (ICRC) also have competence to effectively deal with internal displacement and may be better placed to maintain the values of independence, neutrality, and impartiality.<sup>249</sup> The re-orientation of UNHCR's function has also resulted in UNHCR being the primary implementer of international refugee protection at the domestic level. This essentially means that UNHCR is effectively supervising itself, thus posing an ethical and legal dilemma.<sup>250</sup>

### 3.8 Additional opportunities for NHRIs

NHRIs have traditionally focused their activities in promotion and protection of human rights broadly in tandem with their evolution within the traditional international human rights framework. Thus, the pattern of engagement with the promotion and protection of refugee rights varies widely, with some NHRIs actively engaged in such matters, to others having minimal or ad-hoc engagement. On the one hand, the limited engagement with refugee issues can be attributed to the NHRIs' structure and the prioritisation of limited resources to address broader human rights concerns.<sup>251</sup> For instance, in terms of structure, refugees and other non-citizens are unlikely to be aware of, or to have access to the complaints-handling function, common among NHRIs.<sup>252</sup> As will be discussed in chapters 6 and 7, refugee protection also

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<sup>248</sup> Goodwin-Gill, 234.

<sup>249</sup> Goodwin-Gill, "Refugee Identity and Protection's Fading," 246.

<sup>250</sup> James Hathaway, North, Pobjoy, 324. See also Gil Loescher, "UNHCR at Fifty: Refugee Protection and World Politics" in *Problems of Protection: The UNHCR, Refugees and Human Rights*, eds., Niklaus Steiner, Mark Gibney, Gil Loescher, (New York: Routledge, 2012), 12-18; Guy Goodwin-Gill, "UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield," *US Committee for Refugees World Refugee Survey 2000* (Washington DC: USCRI, 2000), 26-31.; For a discussion on the contextual need for UNHCR's adaptation including the pros and cons of this shift see David Lanz, "Subversion or Reinvention - Dilemmas and Debates in the Context of UNHCR's Increasing Involvement with IDPs," *Journal of Refugee Studies* 21, no. 2 (April 2008): 192-209.

<sup>251</sup> Richard Carver, "Refugees and National Human Rights Institutions: A Growing Engagement: Opinion Piece," *Journal of Human Rights Practice*, 9, (2017): 219, doi: 10.1093/jhuman/hux017

<sup>252</sup> Richard Carver, "Refugees and National Human Rights Institutions," 219.



tends to be highly politicised at the domestic level, and NHRIs may be reluctant to engage substantially on such matters.<sup>253</sup> There are developments at the international and regional levels that attempt to heighten the role of NHRIs in the promotion and protection of refugee rights.

At the international level, NHRIs could potentially have their mandates expanded to deal with places of detention through the Optional Protocol to the Convention Against Torture (OPCAT). The OPCAT, in Article 18(4) envisages a role for NHRIs through the National Preventive Mechanism (NPM). The NPM is required to monitor State compliance with CAT. It includes the requirement that the NPM conducts regular visits to all detention places, including immigration detention facilities.

The inclusion of this article in the OPCAT is due to NHRIs' substantive contribution to the drafting of the OPCAT and to torture prevention efforts globally.<sup>254</sup> It also provides NHRIs with the opportunity to contribute to norms and standards with respect to immigration detention for refugees and asylum seekers, given the normative gap that exists. Several NHRIs have been designated as NPMs, and have thus had their mandates widened to deal directly with immigration detainees, who may include refugees and asylum seekers.<sup>255</sup> In addition, in Africa, the Zimbabwean and Rwandan NHRIs have explicit mandates with respect to monitoring refugee camps and immigration detention facilities respectively.<sup>256</sup> The primary NHRIs in South Africa and Kenya that are included in this study also monitor places

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<sup>253</sup> Carver, "Refugees and NHRIs," 219.

<sup>254</sup> An NHRI working group participated in the OPCAT drafting process. African NHRIs participated in the drafting process of the ACHPR's Robben Island Guidelines for the Prohibition and Prevention of Torture (the SAHRC facilitated the launch of these guidelines). NANHRI has a close working relationship with the Association for the Prevention of Torture (APT) one of the lead organisations involved in torture prevention across the globe.

<sup>255</sup> Elina Steinerte, "The African National Human Rights Institutions," 101-108; Richard Carver, "Refugees and NHRIs," 218.

<sup>256</sup> Charles M Fombad (ed.), *Compendium of Documents on NHRIs*, 244

of detention. They have both played key roles in highlighting and remedying violations of rights of refugees and asylum seekers in places of detention.<sup>257</sup>

At the regional and national levels, NHRIs are increasingly dealing with conflict and the resultant displacement.<sup>258</sup> This has led to the emergence of a normative framework for NHRI engagement in situations of conflict and with refugee protection. In 2015, NHRIs adopted two important declarations. The first was the Kyiv Declaration for NHRIs working in conflict.<sup>259</sup> It sets out specific areas of engagement for NHRIs in conflict and post-conflict situations including in promoting and protecting refugee rights. The second was the “Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants.”<sup>260</sup> It identifies areas for engagement for NHRIs including “inspecting places of detention or other refugee holding centres; combating xenophobia and increasing public awareness on refugee rights; and coordinating refugee-related activities regionally and internationally.”<sup>261</sup>

In Africa, NHRIs adopted in 2007, the “Kigali Declaration on Refugees, Internally Displaced Persons and Stateless Persons (Kigali Declaration).” It outlines three sets of recommendations for each of the vulnerable groups. With respect to refugees, it proposes NHRI measures relating to prevention, protection, and the search for durable solutions.<sup>262</sup> In addition to these guiding frameworks, NHRIs also have opportunities to enhance refugee protection through interaction with international and regional human rights mechanisms.

<sup>257</sup> See chapters 6 and 7 of this thesis

<sup>258</sup> NANHRI, *The Role of National Human Rights Institutions in Conflict Management, Resolution and Peace Building: A Baseline Survey of the East African Situation*, accessed 7 May 2018. [http://www.nanhri.org/wp-content/uploads/2016/10/40626KK-NANHRI-Baseline-Study-on-NHRIs-in-Conflict-Management-Peace-building-FINAL-Version-3.indd\\_.pdf](http://www.nanhri.org/wp-content/uploads/2016/10/40626KK-NANHRI-Baseline-Study-on-NHRIs-in-Conflict-Management-Peace-building-FINAL-Version-3.indd_.pdf); Centre for Conflict Resolution, *National Human Rights Institutions, Conflict Management and Peacebuilding in Africa: Technical Seminar Report*, 2004 [http://www.operationspaix.net/DATA/DOCUMENT/5760~v~Seminar\\_Report\\_National\\_Human\\_Rights\\_Institutions\\_Conflict\\_Management\\_and\\_Peacebuilding\\_in\\_Africa.pdf](http://www.operationspaix.net/DATA/DOCUMENT/5760~v~Seminar_Report_National_Human_Rights_Institutions_Conflict_Management_and_Peacebuilding_in_Africa.pdf)

<sup>259</sup> GANHRI, “The Role of National Human Rights Institutions in Conflict and Post-Conflict Situations (Kyiv Declaration): International Conference on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations, Kyiv, Ukraine, 21-22 October 2015.” *GANHRI*.

<sup>260</sup> GANHRI, *Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants*.

<sup>261</sup> GANHRI, *Belgrade Declaration*.

<sup>262</sup> NANHRI, *Kigali Declaration on Refugees, IDPs and Stateless Persons*, Kigali, Rwanda, 10 Oct 2007, at (b), accessed 18 April 2018. <http://www.nanhri.org/download/kigali-declaration/>.

### 3.9 Conclusion

The evolution of the international refugee protection regime outlined in this chapter, presents a protection regime that is behest with numerous challenges. From its infancy, it has been characterised by the pursuit of national interests and reluctance by States, to fully commit to the responsibility of sharing the refugee burden. The result is that the primary institution for international refugee protection, the UNHCR, is plagued with legal and institutional challenges that impede its capacity to effectively deal with international refugee protection. However, this must also be viewed within the context that it operates in. For instance, the nature of refugee flows has changed significantly from the 1920s when international protection was initially conceived. States have also shifted their consideration of refugee protection from a humanitarian character, to that of national interest, which has little regard for complying with international legal obligations.

Therefore, the opportunities presented by a reconceptualization of refugee protection in human rights terms, are useful in the attempts to remedy both the normative and implementation gaps that exist. It is within this nexus that NHRIs may have a pivotal role. Examples of NHRI practice in refugee protection show promising results on their capacity to hold States accountable for violations or inaction. The emergence of a normative framework for NHRIs in this regard, will also be useful for their systematic engagement within the international refugee protection regime.

## Chapter 4

### General overview of NHRIs and the domestic refugee protection regimes in South Africa and Kenya

#### 4.1 Introduction

This chapter provides an overview of the national institutions established for the promotion and protecting of human rights in South Africa and Kenya. It traces their legislative frameworks and discusses their mandates in order to provide an understanding of their role in advancing refugee rights. The chapter also presents an overview of the domestic refugee regimes in both South Africa and Kenya and discusses the key challenges faced in the promotion and protection of refugee rights in the respective countries. The specific role that the NHRIs have played within the domestic refugee protection regimes will be analysed in chapter 6 and 7.

#### 4.2 The NHRIs in South Africa

There are three primary NHRIs in South Africa. These are the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (the Gender Commission) and the Office of the Public Protector (Public Protector). These institutions are among several independent institutions entrenched in Chapter Nine of the 1996 South African Constitution described as “institutions supporting constitutional democracy” or “Chapter Nine” institutions.<sup>1</sup> The South African National Assembly recently initiated consultations to consider the amalgamation of some of the Chapter Nine institutions to create a single human rights body entitled the South African Commission for Human Rights and Equality.<sup>2</sup> The

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<sup>1</sup> Constitution of the Republic of South Africa (1996 Constitution), Chapter 9: State Institutions Supporting Constitutional Democracy, Section 181(1).

<sup>2</sup> SAHRC, SAHRC Submission: Response to the ISD Questionnaire on a Single Human Rights Body (South African Commission for Human Rights and Equality) June 2017, accessed 4 June 2017, <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission-%20Response%20to%20ISD%20Questionnaire%20Single%20Human%20Rights%20Body-FINAL-%20June%202017.pdf> .

primary aim is to consolidate resources and reduce duplication of work.<sup>3</sup> These three NHRIs participate in the Forum of Institutions Supporting Democracy (FISD) which was created, following the review of Chapter Nine institution activities, as a mechanism to enhance cooperation, collaboration, resource sharing and to reduce duplication of activities where mandates of these institutions overlapped.<sup>4</sup> The importance of the opportunities that this forum presents for these three NHRIs within the context of refugee rights promotion and protection will be explored in chapter 6.

#### **4.2.1 The South African Human Rights Commission**

The South African Human Rights Commission (SAHRC) was initially established under the 1993 interim Constitution<sup>5</sup> in 1995 and inaugurated in March 1996 under the Human Rights Commission Act 54 of 1994. Section 184 (1) of the 1996 Constitution provides the SAHRC with a general mandate to promote, monitor and assess the observance of human rights in South Africa. Section 184(1)(a) requires the SAHRC to "promote respect for human rights and a culture of human rights"; section 184(1)(b) requires the SAHRC to "promote the protection, development and attainment of human rights"; and in terms of section 184(1)(c), the SAHRC must "monitor and assess the observance of human rights in the Republic."<sup>6</sup> The SAHRC's has powers as defined in Section 184(2). These are:

- (a) To investigate and to report on the observance of human rights
- (b) To take steps to secure appropriate redress where human rights have been violated
- (c) To carry out research and
- (d) To educate.<sup>7</sup>

<sup>3</sup> Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions (Kader Asmal Report)*, 31 July 2007: 168-169.

<sup>4</sup> Parliament of the Republic of South Africa, *Report of the ad hoc Committee*, Parliament of the Republic of South Africa, "Office on Institutions Supporting Democracy," *Parliament of the Republic of South Africa*, <https://www.parliament.gov.za/office-inst-support-democracy> (accessed 26 June 2020)

<sup>5</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>6</sup> 1996 South Africa Constitution.

<sup>7</sup> 1996 Constitution, Section 184(2).

The Constitution also assigns the SAHRC a specific function in relation to socio-economic rights. Section 184(3) states that, "each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."<sup>8</sup>

These functions and powers are supplemented further by those contained in the South African Human Rights Commission Act No. 40 of 2013 (SAHRC Act), which replaced the 1994 enabling legislation (Human Rights Commission Act).<sup>9</sup> The SAHRC's additional mandate is derived from other pieces of legislation. These are: the Promotion of Access to Information Act No. 2 of 2000 (PAIA) which empowers the SAHRC to monitor and report on the implementation of the right of access to information<sup>10</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (PEPUDA) which empowers the SAHRC to monitor the right to equality in collaboration with the Gender Commission.<sup>11</sup> Both the SAHRC and the Gender Commission enjoy the right of appearance in Equality Courts and are appointed as members of the Equality Review Committee.<sup>12</sup>

The SAHRC Act also enumerates the Commission's composition and mode of operation including the appointment of its Commissioners. Section 13 of the SAHRC Act expounds on the SAHRC's powers and functions. Most of the content of the SAHRC Act

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<sup>8</sup> 1996 Constitution, Section 184(3).

<sup>9</sup> South African Human Rights Commission Act No. 40 of 2013, Section 13.

<sup>10</sup> Promotion of Access to Information Act No. 2 of 2000, Sections 83-85.

<sup>11</sup> Promotion of Equality and Prevention of Unfair Discrimination Act No.3 of 2000 (PEPUDA), Section 25(2), 25(5) and 28(2).

<sup>12</sup> PEPUDA Section 20 and 32 respectively. The Equality Review Committee (ERC) is tasked with advising the Minister of Justice about the operation of the Act and about laws that impact on equality. The ERC is also required to submit regular reports to the Minister on the operation of the Act, addressing "whether the objectives of the Act and the Constitution have been achieved and must make recommendations on any necessary amendments to the Act to improve its operation. The ERC must also advise the Minister on measures to give full effect to the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

See PEPUDA Section 33 on the Powers and Functions of the Equality Review Committee and the PEPUDA Regulations. Government Notice: Department of Justice and Constitutional Development, *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, Regulations*, 2003.  
[http://www.justice.gov.za/EQCact/legislation/eqc\\_1final\\_reg\\_eng.pdf](http://www.justice.gov.za/EQCact/legislation/eqc_1final_reg_eng.pdf)

reflects the minimum standards prescribed by the Paris Principles.<sup>13</sup> Indeed, the 2013 SAHRC Act provides a stronger basis for the SAHRC's compliance with the Paris Principles than its enabling Act of 1994.<sup>14</sup> For instance, the 2013 SAHRC Act departs from the previous legislation in providing a direct mandate for the SAHRC to monitor the implementation and compliance with international and regional human rights norms and standards.<sup>15</sup> While the SAHRC had undertaken this role since its inception, its authority to do so was implied.<sup>16</sup> This provides the SAHRC with a direct mandate to monitor State compliance with international and regional refugee law.

In addition, in terms of the appointment of Commissioners, the SAHRC Act sets the number of Commissioners of the SAHRC to eight while previously the number of Commissioners appointed to office was upon the discretion of the President.<sup>17</sup> The HRC Act of 1994 provided only for a minimum of five Commissioners.<sup>18</sup> Therefore, the SAHRC's first term from 1995 to 2002 had eleven Commissioners but this number was reduced to six in the second term (2002 to 2009).<sup>19</sup> This provision has strengthened the composition requirements of the SAHRC in line with the Paris Principles.<sup>20</sup>

The SAHRC also has quasi-judicial powers. Section 13(3) of the SAHRC Act provides that the SAHRC is competent to "investigate on its own initiative or on receipt of a

<sup>13</sup> The SAHRC was accredited with the "A" status in 1999 and has consistently retained this accreditation. Its latest review was in 2017 where it was again conferred with the A status, accessed 10 June.

2018 <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>

<sup>14</sup> The Paris Principles in Section on Competences and Responsibilities at paragraph 3(c) requires NHRIs "to encourage ratification of the international human rights instruments to which the State is a party or accession to those instruments, and to ensure their implementation;"

<sup>15</sup> SAHRC Act Section 13(1) (b) (vi).

<sup>16</sup> SAHRC has stated that this duty was undertaken in compliance with the Paris Principles and in order to give effect to its constitutional obligation to promote a culture of human rights and to monitor and assess the observance of human rights in South Africa. SAHRC, *Annual International Report, 2011*, Johannesburg: SAHRC, 2012.

<sup>17</sup> SAHRC Act, Section 5(1) (a).

<sup>18</sup> HRC Act 1994, Section 3(1).

<sup>19</sup> SAHRC, *Critically Reflecting on an Institutional Journey 2002-2009: The South African Human Rights Commission*. (Johannesburg: SAHRC, 2009).

<sup>20</sup> Paris Principles, Section on "Composition and Guarantees of Independence and Pluralism," Article 1(3) states: "In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."

complaint, any alleged violation of human rights...” and to “bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or a class of persons.”<sup>21</sup> The SAHRC has considerable powers (within the limits of the law) to gather information as set out in Sections 15 and 16 of the SAHRC Act.<sup>22</sup> These include the power to subpoena witnesses, to enter and search premises and to attach and remove articles of relevance to its investigations. These powers provide the SAHRC with the requisite legal means to effectively pursue its investigations and to address more systemic human rights violations.<sup>23</sup>

The SAHRC discharges what is referred to as the “protection” mandate primarily through the complaints-handling process. It utilises its complaints-handling function as the means to “securing redress, advancing constitutional jurisprudence and serving as *amicus curiae*.”<sup>24</sup> However, one of the more pressing challenges is the lack of powers of enforcement. This may have resulted in the lack of implementation of many of its findings and recommendations.<sup>25</sup> This is a challenge often cited by NHRIs across the globe and a view held by observers such as Carver, who notes: “one of the biggest factors leading to a loss of

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<sup>21</sup> SAHRC Act 2013, Section 13(3)(a) & (b).

<sup>22</sup> SAHRC Act 2013, Section 15 (Investigations by Commission) and Section 16 (Entering and search of premises and attachment and removal of articles).

<sup>23</sup> Parliament of the Republic of South Africa, *Kader Asmal Report*, 168-169, accessed 30 May 2018, <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf>.

<sup>24</sup> SAHRC, *Critically Reflecting on an Institutional Journey 2002-2009*, 4.

<sup>25</sup> SAHRC, *Annual Reports to Parliament* <https://www.sahrc.org.za>; Katarina Linos and Thomas Pegram noted that NHRIs such as the Commission on Human Rights and Administrative Justice of Ghana and the Ugandan Human Rights Commission, which have court-like powers, have had greater successes in remedying human rights violations. The CHRAJ has a broad mandate encompassing human rights, unfair treatment and corruption. It also has the power to pursue enforcement, able to bring an action before any court in Ghana and seek any remedy available. These powers are further underpinned by the Ghanaian courts opting to enforce the CHRAJ’s recommendations without reopening the cases brought before them. The UHRC can order the release of detainees, pay compensation and order any other legal remedy or redress. While it has found in favour of victims particular those who have been tortured, the State has resisted the implementation of its findings, which has led to the erosion of its credibility. See Katarina Linos and Thomas Pegram, *Interrogating Form and Function: Designing Effective National Human Rights Institutions*, (Copenhagen: Danish Institute for Human Rights, 2015), 31-32.



credibility and public legitimacy by NHRIs is an inability to give their recommendations the force of law.”<sup>26</sup>

The SAHRC has largely been seen as credible even though there have been questions about its independence from the ruling political party’s influence.<sup>27</sup> It has struggled with finding a balance between being reactive and proactive and striking a balance between being complaints-handling driven versus focusing on priority human rights issues.<sup>28</sup> This is evident in its approach to handling refugee rights as will be discussed in chapter 6, wherein the SAHRC has identified the rights refugees and asylum seekers as a priority rights issue, but has struggled with implementing a strategy that would address the systemic issues that foster the violation of rights for this category of persons.

As elucidated above, the SAHRC has a broad human rights mandate but does not have a specific mandate to promote and protect the rights of refugees and asylum seekers or other categories of migrants. In practice, and as discussed in chapter 6, this has not hindered its engagement with refugee rights’ promotion and protection. The SAHRC has interpreted its mandate broadly on the basis that the Constitution requires the protection of the rights of all persons in South Africa.<sup>29</sup> This argument, as Pegram asserts, is supported by NHRI advocates

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<sup>26</sup> Richard Carver, *Performance and Legitimacy: National Human Rights Institutions* (Versoix: International Council on Human Rights Policy, 2000), 92.

<sup>27</sup> Hellen Zille, “SAHRC a Dumping Ground for ANC Cadres,” accessed 10 June, 2018, <http://www.politicsweb.co.za/about/sahrc-a-dumping-ground-for-anc-cadres--zille>.

<sup>28</sup> SAHRC, *Critically Reflecting on an Institutional Journey, 2002-2009*, (Johannesburg: 2010), 8; NHRI expert Richard Carver highlights the risk of an NHRIs focus on complaints-handling which may include capacity overload resulting in a loss of a strategic focus on priority human rights concerns. Richard Carver, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva: International Council on Human Rights, 2005). This is because complaints received may not necessarily reflect the most serious human rights violations, yet NHRIs with the complaints-handling function are required to deal with all the complaints that they receive. In fact, many NHRIs peg their effectiveness on the number of complaints finalized within a financial year. For a discussion on this, see Katerina Linos and Thomas Pegram, *Interrogating Form and Function*, 30-32. Linos and Pegram, also note that the first generation of Commissioners of the SAHRC rejected a complaints-driven agenda (at 31).

<sup>29</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

who perceive a broad and unrestrictive human rights mandate as essential - particularly in the context of rising xenophobia against migrants, refugees and asylum seekers.<sup>30</sup>

#### 4.2.2 The Commission for Gender Equality

The Commission for Gender Equality (Gender Commission) is, as with the SAHRC, an independent institution entrenched in Chapter Nine of the 1996 South African Constitution.<sup>31</sup> It is a specialised national human rights institution tasked with the promotion of gender equality. The Gender Commission was initially established by the 1993 interim Constitution and as stated above, its establishment was reaffirmed by the 1996 Constitution. Its enabling legislation was enacted by Parliament in 1996.<sup>32</sup> It therefore has both a constitutional and legislative mandate.

Its constitutional mandate derives from Section 187 of the 1996 Constitution, which states that the Gender Commission “must promote respect for gender equality and the protection, development and attainment of gender equality.”<sup>33</sup> It also provides that the Gender Commission has powers including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.<sup>34</sup> Its legislative mandate derives from the Commission on Gender Equality Act No. 39 of 1996 (CGE Act) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Gender Commission’s powers and functions are very similar to those of the SAHRC, except of course with the focus being on promoting and protecting the respect for gender equality. It has not been accredited by the global NHRI network, GANHRI, despite it

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<sup>30</sup> Thomas Pegram, “National Human Rights Institutions”, 210-240; Richard Carver, “National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law,” in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* edited by Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, 2012), 181-209; Richard Carver, “Refugees and National Human Rights Institutions: A Growing Engagement,” *Journal of Human Rights Practice* 9, Issue 2 (July 2017): 216–222, <https://doi.org/10.1093/jhuman/hux017>

<sup>31</sup> 1996 South African Constitution, Section 181(1) (d).

<sup>32</sup> Commission on Gender Equality Act No. 39 of 1996.

<sup>33</sup> 1996 South African Constitution, Section 187.

<sup>34</sup> 1996 South African Constitution, Section 181(1) (d).

generally meeting the elements of an effective NHRI as prescribed by the Paris Principles.<sup>35</sup>

While discussions have been undertaken with the SAHRC to determine the modalities of the Gender Commission pursuing accreditation, no formal arrangement has yet been concluded.<sup>36</sup>

A key challenge is that the Gender Commission does not have a broad mandate as provided by the Paris Principles in paragraph 2 under the Competence and Responsibilities section.<sup>37</sup> Notwithstanding, GANHRI may still consider an application for accreditation should certain conditions be met.<sup>38</sup> The Gender Commission has also struggled with credibility due to operational and institutional challenges it has faced since its establishment.<sup>39</sup> These factors may have played a role on the extent to which the SAHRC and the Gender Commission collaborate substantively, even where mandates overlap.

As a specialist NHRI, the Gender Commission can play a significant role in promoting and protecting the rights of those refugees and asylum seekers who face vulnerabilities due to gender. For instance those who are particularly vulnerable to gender –

<sup>35</sup> Rashida Manjoo, Case Study: The Commission for Gender Equality, South Africa,” *Griffith Law Review*, 14, no. 2 (2005): 273 <https://doi-org.ezproxy.uct.ac.za/10.1080/10383441.2005.10854560>.

<sup>36</sup> Author’s personal involvement as a SAHRC staff member in consultations held intermittently from 2012 to 2016 between the SAHRC and Gender Commission on accreditation to allow the Gender Commission to participate independently and as an NHRI in international and regional fora

<sup>37</sup> The paragraph states, “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.” General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)* Adopted by General Assembly (Resolution 48/134 of 20 December 1993), accessed 31 May, 2018, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>. In its General Observations, the SCA interprets this provision to mean that an NHRI’s mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights. GANHRI, General Observations of the Sub-Committee on Accreditation, General Observation 1.2, *GANHRI*, accessed 2 February, 2018, [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf)

<sup>38</sup> See GANHRI, General Observation 6.6 (as amended on February 2018) [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf)

<sup>39</sup> Parliament of South Africa, *Report of the Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions*, 2009 (Kader Asmal Report), 146-162; Sheila Meintjes, “Gender Equality by Design: The Case of South Africa’s Commission on Gender Equality,” in *South African Journal of Political Studies*, 32, no. 2 (2005): 259-275 accessed 30 May 2018, <https://doi-org.ezproxy.uct.ac.za/10.1080/02589340500353631>; Ad Hoc Committee on the Commission for Gender Equality Forensic Investigation, *Report of the Ad Hoc Committee on the Commission for Gender Equality (CGE) Forensic Investigations, dated 19 April 2011*; Rashida Manjoo, “Case Study: Commission for Gender Equality, South Africa,” 276-278.

based violence and sexual exploitation and those who are highly marginalised not only due to gender but also as a result of other factors such as being a sexual minority, elderly or being a person with disability.

#### 4.2.3 The Office of the Public Protector

The Office of the Public Protector (Public Protector) is also a constitutional and legislative body. It is entrenched in chapter nine of the 1996 Constitution. The Public Protector is mandated to investigate “any conduct in state affairs...that is alleged or suspected to be improper or to result in any impropriety or prejudice” and to report on the findings of its investigation and “take appropriate remedial action” where it determines misuse of power.<sup>40</sup> Its legislative mandate derives primarily from the Public Protector Act 23 of 1994.<sup>41</sup> In international terms, the Public Protector is considered an ombudsman and is a member of the international association of ombudsman institutions, the International Ombudsman Institute (IOI).<sup>42</sup> It is however, not accredited by the global NHRI network, the GANHRI-though a significant number of ombudsman institutions hold dual membership with the IOI and the GANHRI.<sup>43</sup>

The Public Protector does not have an explicit human rights mandate, but the complaints it handles often involve the infringement of a human right.<sup>44</sup> The Public Protector refers infringements that are indicative of systemic human rights violations, to the commissions, and may conduct joint investigations and other activities with the other

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<sup>40</sup> South Africa Constitution, Section 182.

<sup>41</sup> Its additional functions are drawn from other pieces of legislation including the Executive Members' Ethics Act 82 of 1998, and the Prevention and Combatting of Corrupt Activities Act 12 of 2004. A comprehensive list is available from The Office of the Public Protector, *Constitutional and Legislative Mandate of the Public Protector*. Pretoria: Office of the Public Protector, 2010.

<sup>42</sup> IOI, *Members*, accessed 26 January, 2020, <https://www.theioi.org/ioi-members>.

<sup>43</sup> GANHRI, *Chart of the Status of National Institutions*.

<sup>44</sup> PMG, *Public Protector Office: Report from the Office of the Public Protector: The Justice Portfolio Committee: 18 March 1998*, para 5.4. accessed 26 January, 2020, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/1998/980317public.htm>.

commissions.<sup>45</sup> The Public Protector has enjoyed a relatively high level of credibility since its establishment.<sup>46</sup> However, the current Public Protector is faced with questions about her competence to hold the office.<sup>47</sup> There is also limited evidence to indicate a systematic approach to collaboration amongst the three institutions.<sup>48</sup> The Public Protector has a significant role to play within the refugee protection regime given its mandate to investigate maladministration and corruption. As will be discussed in the section below, the challenges faced within the South African refugee protection regime stem primarily from the failings within the Department of Home Affairs (DHA), the state organ tasked with the implementation of the Refugees Act. There is limited evidence available that indicates that the Public Protector has intervened with the DHA to address the systemic challenges that affect the DHA's functioning generally or specifically with respect to access to rights for refugees and asylum seekers. The Public Protector's role will be discussed in detail in chapter 6.

### 4.3 The refugee protection regime: South Africa

South Africa employs an urban refugee policy, thus does not operate any refugee camps.<sup>49</sup>

The South African government does not provide any social assistance to refugees and asylum

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<sup>45</sup> For instance, SAHRC, *Media Statement: Public Protector, Human Rights Commission to intervene in the Alexandra crisis, 10 April, 2019*, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1863-media-statement-public-protector-human-rights-commission-to-intervene-in-the-alexandra-crisis>, accessed 26 January, 2020.

<sup>46</sup> Tseliso Thipanyane, "Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and the Public Protector," *New York Law School Law Review*, 60 (2015-2016): 131-132.

<sup>47</sup> Genevieve Quintal, "Start of process to remove public protector gets the thumbs up: National Assembly Speaker Thandi Modise approves request for proceedings against Busisiwe Mkhwebane," *BusinessDay*, accessed 26 January 2020. <https://www.businesslive.co.za/bd/national/2020-01-24-start-of-process-to-remove-public-protector-gets-the-thumbs-up/>.

<sup>48</sup> Catherine Musuva, *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa's Public Protector and Human Rights Commission, Research Report*, (Johannesburg: EISA, 2009) 32.

<sup>49</sup> The SA local governments have on occasion established temporary shelters on the outskirts of major urban areas to house foreign nationals, regardless of status, who had been displaced by xenophobic violence such as the Harmony Park, Youngsfield, Bluewaters 'refugee' shelters on the outskirts of Cape Town (2008-2010), accessed 29 June 2018, [https://www.youtube.com/watch?v=Fq\\_PHRPrUy](https://www.youtube.com/watch?v=Fq_PHRPrUy); <https://mg.co.za/article/2008-10-17-cape-town-to-close-one-refugee-shelter-on-friday> and the Chatsworth Interim Shelter in Durban (2015),

seekers as these categories of persons are not by law, restricted from enjoying any of the rights afforded to South African citizens, with the exception of the right to vote. This generous protection regime however, belies the reality that many refugees and asylum seekers face when accessing the rights they are entitled to. This is due in part to the failure of the government to effectively implement the existing laws and policies resulting in challenges of access to basic rights for refugees and asylum seekers.<sup>50</sup> These challenges have a historical basis.

In 1994, South Africa hosted almost 92,000 refugees.<sup>51</sup> When the Refugees Act of 1998 (Refugees Act) came into force in 2000, the number of refugees had dropped to approximately 15,000 and asylum seekers were 15,000.<sup>52</sup> The latest UNHCR statistics indicate that the number of refugees is 89,285 and asylum seekers are 184,203.<sup>53</sup> Prior to 1998, there was no refugee specific legislation in place in South Africa. Following the end of Apartheid, South Africa acceded to the 1951 Refugee Convention and its Protocol as well as the AU Refugee Convention in 1996.<sup>54</sup> This provided part of the legal basis for the adoption of a legislative framework specifically for refugees and asylum seekers. In the absence of specific commitments to international refugee law and domestic legislation for refugees, the UNHCR had signed a memorandum of understanding (MOU) with the South African apartheid-era government in 1991.

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accessed 2 July 2018, [http://www.durban.gov.za/Resource\\_Centre/Press\\_Releases/Pages/Chatsworth-Interim-Shelter-Is-Officially-Closed-As-African-Immigrants-Are-Successfully-Reintegrated.aspx](http://www.durban.gov.za/Resource_Centre/Press_Releases/Pages/Chatsworth-Interim-Shelter-Is-Officially-Closed-As-African-Immigrants-Are-Successfully-Reintegrated.aspx).

<sup>50</sup>See for example, Roni Amit, No Way In: Barriers to Access Services and Administrative Justice at South Africa's Refugee Reception Offices.

<sup>51</sup> UNHCR, *Statistical Yearbook*, 2017.

<sup>52</sup> UNHCR, *Statistical Yearbook*, 2017.

<sup>53</sup> UNHCR, *Global Trends Report, 2018*. UNHCR's data is sourced primarily from the South African Government's Department of Home Affairs; it does not have any independent monitoring systems. There are contradictions between what both the DHA and the UNHCR report on with respect to actual figures of refugees and asylum seekers in South Africa. Source: Peter Cunliffe-Jones and Julian Rademeyer, *Is South Africa the largest recipient of asylum seekers worldwide?* Africa Check: 2015, accessed 5 June 2018, <https://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

<sup>54</sup> UNHCR, *State Parties to the 1951 Refugee Convention Relating to the Status of Refugees and the 1967 Protocol*, accessed 10 June 2018, <http://www.unhcr.org/afr/3b73b0d63.pdf> and ACHPR, *Ratification Table: AU Convention Governing Specific Aspects of the Refugee Problem in Africa*, accessed 10 June 2018 <http://www.achpr.org/instruments/refugee-convention/ratification/>.

This MOU officially recognised a role for the UNHCR in South Africa and served as the legal basis for protecting refugee rights.<sup>55</sup> However, the agreement was limited in scope and focused on returnees and Mozambican refugees.<sup>56</sup> The MOU stated, “...this Agreement embodies the basic conditions under which the UNHCR shall...carry out its mandated functions in favour of returnees...”<sup>57</sup> The Agreement only provided protection to Mozambican refugees who resided in South Africa.<sup>58</sup> The UNHCR implemented the voluntary repatriation of those refugees who opted to return to Mozambique while those who remained in South Africa were regularised.<sup>59</sup>

However, the UNHCR’s role grew when South Africa began to formally deal with other groups of refugees in 1993 when it concluded a subsequent Basic Agreement. This Agreement was signed because the South African government was “willing to apply internationally accepted principles pertaining to the protection and treatment of asylum seekers and refugees.”<sup>60</sup> It forms the substantive basis of the UNHCR’s operations in South Africa, which focus on coordination with Government and advocacy for refugee protection.<sup>61</sup> It was also one of the key official reference points for South Africa’s refugee policy prior to the enactment of the Refugees Act of 1998.<sup>62</sup>

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<sup>55</sup> UNHCR, *The Basic Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in the Republic of South Africa*. (1991 Basic Agreement), accessed 28 May 2018, <http://www.refworld.org/docid/3ee726024.html>.

<sup>56</sup> The MOU defined a returnee as “any South African refugee and/or political exile who returned to South Africa voluntarily as an armed civilian.”

<sup>57</sup> *1991 Basic Agreement*, Article 2, Section 2: 4

<sup>58</sup> *1991 Basic Agreement*.

<sup>59</sup> Verne Kleinsmidt and Desiree Manicom, “A Policy Analysis of the Refugee Act 130 of 1998,” *Africa Insight* 39, no. 4 (2010): 169.

<sup>60</sup> UNHCR, *The Basic Agreement Between the Government of the Republic of South Africa and United Nations High Commissioners for Refugees* (UNHCR), 6 September 1993 cited in Executive Committee of UNHCR 48<sup>th</sup> Session para 87, accessed 10 June 2018 <http://www.unhcr.org/4a51bb9c9.pdf>.

<sup>61</sup> UNHCR, “UNHCR in South Africa: Presentation to the Parliamentary Portfolio Committee of Home Affairs 11 November 2014,” Cape Town, South Africa.

<sup>62</sup> Jeff Handmaker, “Who Determines Policy? Promoting the Rights of Asylum Seekers in South Africa,” *International Journal of Refugee Law* 11, no.2 (1999): 290-309.



In the absence of refugee specific legislation, the Aliens Control Act, despite its problematic provisions, provided the legal basis for processing asylum claims.<sup>63</sup> This Act was found to be ‘manifestly unsuitable for the purpose of refugee protection.’<sup>64</sup> The Act only controlled the admission, residence, work and exit of foreign nationals, but did not recognise persons in need of protection nor accord any rights to asylum seekers or refugees.<sup>65</sup> In addition, many aspects of the legislation were found to be unconstitutional in light of the 1996 Constitution.<sup>66</sup> The Aliens Control Act was eventually repealed in 2002 by section 54 of the Immigration Act 13 of 2002 as amended by Act 19 of 2004.<sup>67</sup>

In 1995, following a request from the South African government, the UNHCR drafted the initial version of the first piece of legislation on refugee matters in South Africa.<sup>68</sup> It took another three years of consultation with civil society, refugee law experts, the SAHRC and the Gender Commission before the final draft Refugees Bill was presented before Parliament in 1998.<sup>69</sup> This was finally adopted as the Refugees Act 130 of 1998 and entered into force in April 2000. In the interim period between 1998 and 2000, the Aliens Control Act continued to serve as the basis for administering the asylum process despite several of its provisions having been rendered null and void due to their unconstitutionality.<sup>70</sup>

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<sup>63</sup> Handmaker, “Who Determines Policy.”

<sup>64</sup> Jonathan Klaaren, Jeff Handmaker and Lee Anne de la Hunt, “Talking a New Talk: A Legislative History of the Refugees Act 130 of 1998,” in *Advancing Refugee Protection in South Africa* ed., Jeff Handmaker, Lee Ann de la Hunt and Jonathan Klaaren (New York: Berghahn Books, 2011), 48.

<sup>65</sup> Klaaren, Handmaker and de la Hunt, “Talking a New Talk,” 48.

<sup>66</sup> For a discussion on the unconstitutionality of the Aliens Control Act 96 of 1991 see for instance, Thomas H Ficks, “The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa's Pariah-the Undocumented Immigrant,” in *Indiana Journal of Global Studies* 7, Issue 1, Article 15 (Fall 1999): 393-417 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1182&context=ijgls>

<sup>67</sup> Immigration Act 13 of 2002; Immigration Amendment Act 19 of 2004.

<sup>68</sup> Klaaren, Handmaker and de la Hunt, “Talking a New Talk,” 48.

<sup>69</sup> Klaaren, Handmaker and de la Hunt, 48.

<sup>70</sup> Klaaren, Handmaker and de la Hunt, “Talking a New Talk...,” 48. See for example *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others*, 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC); 2000(1) BCLR 39 (CC); *Booyesen and Others v Minister of Home Affairs and Another*, 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC); *Minister of Home Affairs v Dominique Liebenberg*, 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC).



A series of regulations that the Department of Home Affairs (DHA) issued before the adoption of the Refugees Act, attempted to bridge the gap between South Africa's then immigration law (under the Aliens Control Act) and international law obligations and norms with respect to refugees.<sup>71</sup> These too had their limitations, for instance, they did not provide for a process of review or appeal of decisions taken with respect to asylum applications or the refugee status determination process.<sup>72</sup>

In addition to the Refugees Act, the Immigration Act (as amended by the Immigration Amendment Act of 2011) (the Act) also recognises asylum seekers.<sup>73</sup> The Act allows for the issuance of an asylum transit visa at ports of entry for persons who claim to be asylum seekers.<sup>74</sup> In terms of the Act, a person who claims asylum has five days within which to apply for asylum at a specific Department of Home Affairs' office known as a "Refugee Reception Office."<sup>75</sup> Should a person fail to do so, that person becomes an illegal foreigner and may be deported.<sup>76</sup>

#### **4.3.1 The Refugees Act, 1998**

The Refugees Act establishes a refugee protection system that is rooted in the norms and standards as prescribed by international and regional refugee law and underscored by the Bill of Rights in chapter two of the 1996 Constitution.<sup>77</sup> The Act established Refugee Reception

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<sup>71</sup> Obeng Mireku, "South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties," *Law and Politics in Africa, Asia and Latin America* 35, no. 3 (3. Quarter 2002): 399. The South African Department of Home Affairs issued Passport Control Instructions (now referred to as a Directive) that provided the broad guidelines the Department would use to receive and process applications for political asylum and dealing with foreigners.

<sup>72</sup> Human Rights Watch, *Living on the Margins: Inadequate Protection of Refugees and Asylum Seekers in Johannesburg*, November 16, 2005 <https://www.hrw.org/report/2005/11/16/living-margins/inadequate-protection-refugees-and-asylum-seekers-johannesburg>.

<sup>73</sup> Immigration Amendment Act 13 of 2011, which entered into force in May 2014.

<sup>74</sup> Immigration Act 13 of 2002 as amended, Section 23 (Asylum transit permit).

<sup>75</sup> Immigration Act, Section 23.

<sup>76</sup> Immigration Act, Section 32 states: "(1) any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status. (2) Any illegal foreigner shall be deported."

<sup>77</sup> Verne Kleinsmidt and Desiree Manicom, "A Policy Analysis," 172. The Refugees Act has been amended several times since coming into force in 2008 by the Refugee Amendment Act No. 33 of 2008, in 2011 by the Refugees Amendment Act No. 12 of 2011, in 2015 by the Refugees Amendment Act No. 10 of 2015 and recently by the Refugees Amendment Act No. 11 of 2017.

Offices (RRO), which facilitate the administration of refugee management. The RROs are tasked with issuing permits to refugees and asylum seekers. Its officials also conduct the eligibility and refugee status determination interviews.<sup>78</sup> It also outlines the system of review and appeals conducted through the Standing Committee on Refugee Affairs (Standing Committee) and the Refugee Appeals Board (RAB) respectively.<sup>79</sup>

In addition, the Act outlines the rights and duties of refugees and asylum seekers, which include access to documentation, right to remain in the country and right not to be unlawfully arrested or detained.<sup>80</sup> It also contains specific provisions for unaccompanied children and for persons with disabilities.<sup>81</sup> Importantly, it protects refugees and asylum seekers from *refoulement*.<sup>82</sup> The Act is supplemented by regulations that stipulate the details for implementing the refugee status determination process.<sup>83</sup>

The Refugees Act defines a refugee in accordance with both the 1951 Refugee Convention and the 1969 OAU Refugee Convention in its section 3 (a) and 3(b) respectively. “Gender” was included as specific grounds for persecution in its definition following the amendment to the Act in 2011.<sup>84</sup> This has pertinent implications for the role of the Gender Commission within the context of addressing the gendered aspects of asylum. The inclusion of this broader definition overcomes the limitations for protection that may arise from the persecution-based definition contained in the 1951 Refugee Convention.<sup>85</sup> This is paramount in the context of the causes of displacement and flight in many parts of Africa, which are usually due to conflict.<sup>86</sup>

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<sup>78</sup> Refugees Act No. 130 of 1998, Section 8.

<sup>79</sup> Refugees Act, Sections 11, 12 and 25-26.

<sup>80</sup> Refugees Act, Section 29.

<sup>81</sup> Refugees Act, Sections 32.

<sup>82</sup> Refugees Act, Section 2.

<sup>83</sup> Government Notice, “Regulations to the South African Refugees Act, No. R366,” 6 April 2000

<sup>84</sup> Refugees Amendment Act, 2011.

<sup>85</sup> Refugees Act.

<sup>86</sup> See for example Jeff Crisp, “Forced Displacement in Africa,” *Refugee Survey Quarterly* 29, no. 3 (2010) [https://www.uni-oldenburg.de/fileadmin/user\\_upload/materiellekultur/ag/migrationgender/download/zu\\_Annex\\_10\\_2Crisp.pdf](https://www.uni-oldenburg.de/fileadmin/user_upload/materiellekultur/ag/migrationgender/download/zu_Annex_10_2Crisp.pdf)

The Act includes as a third category for a refugee, that is, either a spouse or a dependant of a refugee.<sup>87</sup> Thus, an applicant may qualify indirectly as a refugee if he or she is a dependant of the principal applicant for refugee status. The Act in Section 35 provides for the *prima facie* recognition of refugees in the event of a mass influx.<sup>88</sup> Such recognition is at the discretion of the Minister and may be granted on a conditional basis.<sup>89</sup> The Act also contains provisions on the exclusion, cessation and withdrawal of refugee status.<sup>90</sup>

Section 27 through to 34 of the Act set out the rights and duties of refugees and asylum seekers. Refugees and asylum seekers enjoy the same range of rights as South Africans except those rights limited to citizens.<sup>91</sup> Any conditions placed on them during the asylum process must also be in accordance with the Constitution or international law.<sup>92</sup> The Act guarantees refugees the right to seek employment, to basic health care and the right to basic education.<sup>93</sup> It is worth noting that evidence shows that both refugees and asylum seekers in South Africa, face significant challenges in accessing the rights to health and basic education.<sup>94</sup> The Refugees Act has been amended by the Refugees Amendment Act 11 of 2017, subject to the promulgation of the Refugees Amendment Act's regulations and commencement of previous amendments to the Refugees Act passed in 2008 and 2011.<sup>95</sup> The key amendments contained in the Refugees Amendment Act, 2017 are the removal of the

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<sup>87</sup> Refugees Act, Section 3 (c).

<sup>88</sup> Refugees Act, Section 35(1).

<sup>89</sup> Refugees Act, Section 35(1).

<sup>90</sup> Refugees Act, Section 4, 5, 36.

<sup>91</sup> The Constitutional Court held in *Khosa and Others v the Minister of Social Development and Others*: "[t]he Constitution expressly provides that the Bill of Rights enshrines the rights of all people in our country...the word everyone cannot be construed as referring only to citizens." *Khosa and Others v the Minister of Social Development and Others* 2004 6 BCLR 569 (CC) para 47.

<sup>92</sup> Refugees Act Section 22(1) applicants are to be issued with an asylum seeker permit...subject to any conditions determined by the Director-General, which are not in conflict with the Constitution or international law.

<sup>93</sup> Refugees Act 130 of 1998 27 (g) states: A refugee is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

<sup>94</sup> Between 2002-2003, asylum seekers were not allowed to either work or study. They could approach the Standing Committee to lift the prohibition if their case had not been determined within the 180-day period. Following a legal challenge to the prohibition in *Watchenuka v Minister of Home Affairs*, the Standing Committee for Refugee Affairs lifted the prohibition on March 30, 2004 thus allowing all asylum seekers the right to work and to study.

<sup>95</sup> Refugees Amendment Act, 2017.

automatic right to work and study for asylum seekers.<sup>96</sup> The amendment act is silent about how asylum seekers would meet their basic needs and may provide the basis for the South African government to implement an encampment policy.<sup>97</sup>

In terms of refugee status determination, the Act sets out a detailed system for processing asylum applications. The Directorate of Refugee Affairs within the Department of Home Affairs (DHA) is responsible for the asylum process in South Africa. The Directorate also provides the administrative support to the Refugee Appeals Board, which considers all appeals where applications for refugee status have failed. It is also responsible for policy formulation and implementation and thus advises the Refugee Reception Offices on all policy matters. In South Africa, the UNHCR does not play an active role in the refugee status determination process, which is in stark contrast to the situation in Kenya.

Under the regulations of the Refugees Act, an application for asylum seeker must be made in person at a refugee reception office.<sup>98</sup> Once a person indicates the intention to seek asylum, that person will be issued with a temporary non-renewable permit valid for five days.<sup>99</sup> This permit is issued under Section 23(1) of the Immigration Act (Section 23 Permit). An asylum seeker must then avail themselves for an initial interview (referred to as an eligibility interview) conducted by a refugee reception officer (officer). The officer will then issue a temporary asylum seeker permit, with a date for a full refugee status determination (RSD) hearing. This temporary permit is issued under Section 22 of the Act (Section 22 Permit) and is valid for 6 months. A refugee status determination officer then conducts the interview and decides if the asylum seeker qualifies for refugee status.

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<sup>96</sup> Refugees Amendment Act, 2017.

<sup>97</sup> South Africa's White Paper on International Migration proposes the establishment of 'Asylum Seeker Processing Centres' where asylum seekers will be housed while their asylum applications are being processed. Their basic needs would be met in these centres or through intermediaries who can guarantee provision of these services to asylum seekers during their status determination process. Source Department of Home Affairs, *White Paper on International Migration-Final Version*, 2017, accessed 20 January 2020. <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

<sup>98</sup> Refugees Act Regulations, Section 8(1) (a).

<sup>99</sup> Refugees Act Regulations... 2(2) was amended by Immigration Amendment Act (13 of 2011) which reduced the validity of the asylum transit permit from 14 days to 5 days.

If the refugee status is granted, the refugee is issued with a permit (Section 24 permit) and thereafter a refugee identity document. An appeal may be lodged with the Refugee Appeals Board (RAB) where an asylum seeker's application is denied. In theory, the asylum seeker has access to an interpreter, and may submit their statement for purposes of the interviews in a language of their choice. However, practice indicates that access to interpretation services is not always guaranteed.<sup>100</sup> The asylum seeker also has access to the UNHCR and may obtain legal advice. The laws and regulations generally require that the status determination interview takes place within 30 days (one month) and that a decision be issued within 180 days (six months) of launching an application.<sup>101</sup> The prescribed refugee status determination process is straightforward. However, in practice, the refugee status determination process is fraught with challenges as discussed below.

#### **4.4 Key challenges within the refugee protection regime in South Africa**

The Refugees Act provides a protection framework that is comprehensive and reflects international norms and standards. Most of the subsequent amendments and promulgation of its regulations strengthened the Act and clarified roles and responsibilities for those tasked with administering the Act. Crucially, the Refugees Act removed the ad-hoc manner in which South Africa had been providing protection to refugees and asylum seekers.<sup>102</sup> However, numerous studies have identified the implementation challenges that the asylum process in South Africa has faced since the adoption of the Refugees Act.<sup>103</sup>

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<sup>100</sup> Abiola Okpechi, "Access to Justice by Refugees and Asylum Seekers in South Africa," (PhD thesis, University of Cape Town, 2011).

<sup>101</sup> Refugees Act Regulations, Section 3.

<sup>102</sup> Human Rights Watch, "Living on the Margins"; The amendment acts of 2008 and 2011 are yet to be proclaimed. An additional Refugees Amendment Act of 2017 will come into effect after the commencement of the two previous amendment acts.

<sup>103</sup> See for example, CoRMSA, "Protecting Refugees, Asylum Seekers and Immigrants in South Africa." (Johannesburg: CoRMSA, 2008). <http://www.cormsa.org.za/wp-content/uploads/2008/06/cormsa08-final.pdf>; Lee Anne De la Hunt and William Kerfoot, "Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act," in *Advancing Refugee Protection in South Africa*, eds. Jeff Handmaker, Lee Anne De la Hunt, and Jonathan Klaaren, (New York: Berghahn Books, 2008); Kaajal Ramjathan-Keogh, "Presentation to Refugee Status Determination and Rights in Southern and East Africa Regional Workshop Kampala, November

Persistent challenges of corruption, poor decision-making, mismanagement, asylum application backlogs, illegal detention, harassment, lack of recognition of legal documents, delays in decisions, and xenophobia have had a serious impact on effective protection.<sup>104</sup> This has led to the suggestion that the asylum system exists only in name.<sup>105</sup> The challenges faced are categorised as either administrative or relate to the implementation process and are discussed below.

#### 4.4.1 Administrative challenges

The Department of Home Affairs (DHA) has faced persistent administrative obstacles since South Africa committed itself to meeting its international obligations with respect to refugees and asylum seekers. As discussed above, the lack of a proper legal and policy framework resulted in the handling of asylum matters in ad-hoc manner. By the time the Refugees Act had been adopted in 1998, South Africa had already recognised over 22,000 refugees, in the absence of a concise protection framework. However, the transition from the Aliens Control Act regime to the Refugees Act was not properly planned for, thus resulting in a backlog of cases.<sup>106</sup> The DHA has to date, not been able to effectively address the backlogs.<sup>107</sup> This has resulted in perennial delays in the processing of asylum and appeals, recognition of refugees and issuance of requisite legal documents, which many refugees and asylum seekers need to

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2010 Country Report: Refugee Status Determination in South Africa,” (Johannesburg: Lawyers for Human Rights: 2010); Mariann Thamm, “Report Reveals Shocking Levels of Corruption and Serial Abuse at SA Refugee Centres,” *the Daily Maverick*, 22 July 2015, <https://www.dailymaverick.co.za/article/2015-07-22-report-reveals-shocking-levels-of-corruption-and-serial-abuse-at-sa-refugee-centres/#.Wxf6ui-B18c>; Desiree Manicom and Fairuz Mullagee, “The Status of Asylum Seekers and Refugees in South Africa: An Independent Overview,” *Africa Insight* 39, no. 4, (March 2010): 184-197; Verne Kliensmidt and Desiree Manicom, “A Policy Analysis,” 164-183; Cristiano D’Orsi, *The Right to Health for Refugees in South Africa: Concrete Reality or Wishful Thinking?* 13 December 2017, <https://africlaw.com/tag/xenophobia/>; International Federation for Human Rights (FIDH), *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa*, 2008; National Assembly, “State of Refugee Reception Offices: Briefing by the Deputy Minister of Home Affairs,” *PMG*, 28 June 2011.

<sup>104</sup> Roni Amit, *Queue Here for Corruption: Measuring Irregularities in South Africa’s Asylum System*, (Johannesburg, Lawyers for Human Rights and African Centre for Migration and Society: 2015).

<sup>105</sup> Roni Amit, *No Way In: Barriers to Access services and administrative justice at South Africa’s Refugee Reception Offices*, (Johannesburg: African Centre for Migration and Society, 2012), 7.

<sup>106</sup> Human Rights Watch, *Living on the Margins*.

<sup>107</sup> Roni Amit, *No Way In*, 7.

avoid facing harassment, illegal detention and challenges with accessing basic rights guaranteed to them.<sup>108</sup>

The issuance of the Section 23 permit to persons who declare their intent to apply for asylum at the time of entry into South Africa, provides them with a legal status. It is assumed that the asylum seeker would within five days, be able to access a Refugee Reception Office, in order to apply for asylum. The Refugee Reception Offices were initially established in Johannesburg, Cape Town, Pretoria, Port Elizabeth, Durban and Musina. The Department of Home Affairs closed the Johannesburg, Cape Town and Port Elizabeth offices between 2010 and 2012, which has made it difficult for asylum seekers to formally apply for asylum within the stipulated time frame.<sup>109</sup> The closure of the offices has limited access to asylum for refugees and asylum seekers.<sup>110</sup> The closure of the offices has also had a direct bearing on the backlog of cases at all levels of the asylum process including the renewal of refugee permits. The Department has been ordered to open these offices but has consistently ignored all court orders.<sup>111</sup>

The delays in obtaining official documents have also been attributed to the lack of sufficient human resources within the Department of Home Affairs and inadequate equipment to process the applications. These have compounded the backlog. The result of the

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<sup>108</sup> Amit, *No Way In*, 7.

<sup>109</sup> Amit, 7. The Port Elizabeth RRO was reopened in 2018. LHR, “Home Affairs Reopens Refugee Office in Port Elizabeth after Years of Litigation,” LHR, accessed 5 February 2020, <http://www.lhr.org.za/news/2018/home-affairs-reopens-refugee-office-port-elizabeth-after-years-litigation>.

<sup>110</sup> Amit, 7.

<sup>111</sup> The court orders to have these Refugee Reception Offices reopened were issued as follows: Johannesburg in 2011; Cape Town in 2011 and 2017 *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017) September 2017 requiring the RRO to be reopened by 31 March 2018 (case number); and in Port Elizabeth in 2015: *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* (831/2013) [2015] ZASCA 35; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) (25 March 2015). South African Government, “Statement by the Minister of Home Affairs, Mr. Malusi Gigaba MP, on the occasion of the Re-Opening of the Port Elizabeth Refugee Reception Office (PERRO) on 19 October 2018.” <https://www.gov.za/speeches/statement-minister-home-affairs-19-oct-2018-0000>, accessed 26 January, 2020. The Port Elizabeth RRO was re-opened in October 2018, three years after the DHA being ordered to do so but remains closed to new asylum seeker applications. In addition asylum seekers appear at the office on given days, based on nationality/language spoken. This has implications for compliance with legislative timelines related to submission of applications.

delays is that asylum applications take years to be finalised instead of the mandated maximum period of six months. According to its most recent Asylum Report, the UNHCR indicates that the Department of Home Affairs still needs to process approximately 700,000 section 22 cases (initial eligibility interview).<sup>112</sup> There is also a large number of pending appeals which the Department estimates at over 258 000.<sup>113</sup>

In addition, over 1200 cases are under review following a ruling by the High Court that rendered appeals null and void as they had been heard by a Refugee Appeals Board that was improperly constituted.<sup>114</sup> These figures do not include those seeking renewal of their permits.<sup>115</sup> Without proper and valid documentation, asylum seekers face challenges accessing health care, education, financial facilities, harassment from the police and illegal detention.<sup>116</sup> In 2001 and 2006, the Department of Home Affairs together with the UNHCR implemented a backlog project, which assisted in reducing the caseload, but not in the management of new cases.<sup>117</sup> Therefore, the underlying challenges were never addressed and the backlog in the asylum process was not eliminated. For instance, the Department of Home Affairs reported in 2007 that despite efforts to reduce the backlog, it had grown by thirty per cent from 76,000 to 144,000.<sup>118</sup>

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<sup>112</sup> UNHCR statistics. See also Leigh Hamilton, “How Home Affairs Has Been Ignoring 2 Court Orders, Putting Asylum Seekers at Risk, ALPS Resilience,” *News24*, 4 April 2018.

<https://www.news24.com/Columnists/GuestColumn/how-home-affairs-has-been-ignoring-2-court-orders-putting-asylum-seekers-at-risk-20180404>.

<sup>113</sup> National Assembly, *Responses by the Minister of Home Affairs to the Portfolio Committee for Home Affairs*, 9 March 2017. <https://pmg.org.za/committee-question/4690/>, accessed 7 June, 2017.

<sup>114</sup> In 2014, the High Court found the Refugee Appeals Board to have been improperly constituted and rendered its decisions null and void. *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 5 SA 550 (WCC). The RAB did not hear any cases between May 2016 and 20 February 2017 as a result of the above ruling. The DHA has not indicated the exact number of cases that were heard under an improperly constituted RAB.

<sup>115</sup> There are currently no verifiable figures on refugees and asylum seekers with expired permits.

<sup>116</sup> Roni Amit, *No Way In*, 7.

<sup>117</sup> National Assembly, *Responses by the Minister of Home Affairs to the Portfolio Committee for Home Affairs*; For a detailed discussion on the implementation and impact of these two Backlog Projects see Jeff Handmaker, “Efforts to Deal with Asylum Application Backlogs in South Africa,” in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, *Advancing Refugee Protection*, 117-135.

<sup>118</sup> The Centre for Development and Enterprise (CDE), *Migration from Zimbabwe: Numbers, Needs and Policy Options*, Johannesburg: CDE, 2008), 17.



In 2015, the UNHCR and the South African government agreed to develop yet another backlog project to address the outstanding appeal cases.<sup>119</sup> The project was scheduled to run for three years, concluding in 2019.<sup>120</sup> However, the proposed project was not implemented due to capacity and financial constraints. According to the Department of Home Affairs, discussions have been reopened with the UNHCR to develop and finance a comprehensive case management system to overhaul its inefficient case management processes.<sup>121</sup>

The asylum process in South Africa has been plagued with systemic corruption for years.<sup>122</sup> This has been widely reported on in the media and has been acknowledged by the Department of Home Affairs, including in its presentations to Parliament.<sup>123</sup> The United States' report on the state of human rights in South Africa has since 2009 to date, identified corruption as one of the challenges that refugees, asylum seekers and migrants in general face, when dealing primarily with the Department of Home Affairs and the South African Police Services (SAPS).<sup>124</sup> Other international reports have also highlighted the problem with corruption within the South African asylum process.<sup>125</sup>

Several studies have been conducted to identify the degree of the pervasiveness of corruption within the asylum process. For instance, in 2003, the Community Agency for

<sup>119</sup> National Assembly, *Responses by the Minister of Home Affairs to the Portfolio Committee for Home Affairs*

<sup>120</sup> National Assembly, *Responses by the Minister of Home Affairs*

<sup>121</sup> National Assembly, *Responses by the Minister of Home Affairs*

<sup>122</sup> The simple definition of corruption is used here and in the studies being: dishonest or fraudulent conduct by those in power, typically involving bribery (Oxford Dictionary)

<sup>123</sup> Roni Amit, *Queue Here for Corruption*, 3; News24, "Home Affairs official fired over bribe," 7 June 2013, <http://www.news24.com/SouthAfrica/News/Home-affairs-official-fired-overbribe-20130607>. National Assembly, *State of Refugee Reception Offices: briefing by Deputy Minister to the Portfolio Committee on Home Affairs*, 28 June 2011; At the launch of an anti-corruption campaign, the Minister of Home Affairs, Malusi Gigaba stated that, "there was a time when fraud and corruption at Home Affairs were blatant, naked and just plain arrogantly and maliciously pursued."

<sup>124</sup> US Bureau of Democracy, Human Rights and Labour, *Country Reports on Human Rights Practices: South Africa Country Reports 2009-2017*, accessed 7 June, 2018. <https://www.state.gov/j/drl/rls/hrrpt/index.htm>.

<sup>125</sup> United Nations High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report- Universal Periodic Review: South Africa, November 2011*, <http://www.refworld.org/docid/4ed724952.html>; Human Rights Watch, 'Human Rights Watch, World Report, 2007- South Africa, January 2007', <http://www.refworld.org/docid/45aca2a51a.html>; Human Rights Watch, *Living on the Margins*.

Social Enquiry conducted a baseline study of refugees and asylum seekers that included questions about corruption at the Johannesburg, Cape Town, Pretoria, and Durban refugee reception offices.<sup>126</sup> The survey of 1500 refugees and asylum seekers found that despite the Department of Home Affairs not prescribing any fees for services rendered to refugees and asylum seekers, applicants were asked to pay at various stages of the asylum application process.<sup>127</sup>

In 2011, the African Centre for Migration and Society administered two surveys at the refugee reception offices – one targeting new asylum applicants and the other targeting applicants who had undergone status determination interviews.<sup>128</sup> In total, 1417 refugees and asylum seekers participated in the survey.<sup>129</sup> The findings showed that approximately a quarter of respondents were asked for money while queuing, and seven per cent to eight per cent experienced corruption once inside the office. The survey also noted that the highest levels of corruption (40%) occurred while queuing for services at the Pretoria Refugee Reception Office.<sup>130</sup>

In 2015, Lawyers for Human Rights and the African Centre for Migration and Society found that thirty per cent of refugees and asylum-seekers experienced corruption at the refugee reception offices with the highest incidence (51%) at the Pretoria Refugee Reception Office. In addition to these studies, the Public Protector published a report on unlawful conduct at the Braamfontein Refugee Reception Office in Johannesburg.<sup>131</sup> Additional studies by a CSO, Corruption Watch and Amit indicate that the Department of Home Affairs has done little to implement strategies that would eradicate systemic corruption within the

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<sup>126</sup>Community Agency for Social Inquiry, 'National Refugee Baseline Survey: Final Report,' *Researched for Japan International Cooperation Agency & United Nations High Commissioner for Refugees*, November 2003. Cited in Roni Amit, *Queue Here for Corruption*, 13

<sup>127</sup>Community Agency for Social Inquiry, 'National Refugee Baseline Survey

<sup>128</sup> Roni Amit, *No Way In*.

<sup>129</sup> Roni Amit, *No way in*.

<sup>130</sup> Roni Amit, *No way in*.

<sup>131</sup> Public Protector, Report on an Investigation into allegations of undue delay, unlawful and improper conduct and prejudice in the rendering of services at Braamfontein refugee reception centre.

Department.<sup>132</sup> A few officials have been dismissed and arrested for taking bribes, but no measures have been implemented to effectively address corruption within the asylum process. In a briefing to Parliament, the Department of Home Affairs contended that changes to the Refugees Act, through the Refugees Amendment Act 2017, would also provide procedural measures to address corruption within the asylum process.<sup>133</sup> The Department of Home Affairs launched an anti-corruption campaign in 2015, known as *Operation Bvisa Masina* (Clear the Rot), which according to the Department has led to the arrest of eighty-six government officials.<sup>134</sup> There was neither any information available on how many of the arrests related to officials dealing with refugee and asylum seeker matters nor how many of those arrested have been convicted.

A study by Corruption Watch on the impact of corruption on the asylum process, found that the measures that Department of Home Affairs had put in place, including *Operation Bvisa Masina*, were inadequate to effectively deal with corruption.<sup>135</sup> In particular, the anti-corruption measures did not take into account the vulnerabilities and fears that refugees and asylum seekers expressed.<sup>136</sup> Refugees and asylum seekers who participated in this study claimed that they would not report corruption through the Department of Home Affairs' channels due to fear of reprisal, fear of the effect on their application or status determination and fear of providing their personal details to the Department.<sup>137</sup> In addition, this study found that information on corruption reporting was either not available or not

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<sup>132</sup> Corruption Watch, *Asylum at a Price: How Corruption Impacts those Seeking Legal Protection in South Africa (Project Lokisa)*, Corruption Watch, 2016, accessed 2 July, 2018.

<https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/Project-Lokisa-revised-Pg16-22Nov20161.pdf>; Roni Amit, *Queue here for Corruption*.

<sup>133</sup> PMG, *Refugees Amendment Bill: adoption; Border Management Authority Bill: Discussion, with Minister & Deputy Minister*, 12 September 2017, <https://pmg.org.za/committee-meeting/24982/>, accessed 2 July, 2018.

<sup>134</sup> DHA, *Media Statement on the Arrest of Government Officials*, 29 March 2017, <http://www.dha.gov.za/index.php/statements-speeches/952-media-statement-on-the-arrest-of-government-officials>. There is currently no publicly available information to indicate the total number of officials who have been arrested or the status of their arrests or criminal proceedings.

<sup>135</sup> Corruption Watch, *Asylum at a Price*, 28.

<sup>136</sup> Corruption Watch, 28.

<sup>137</sup> Corruption Watch, *Asylum at a Price*, 28.

prominently displayed and was not available in a language readily understood.<sup>138</sup>

Related to the administrative challenges within the system are the legal challenges that have arisen due to the improper application and implementation of the Refugees Act. Various courts have ruled against the Department's (and other Government Departments') interpretation of the Refugees Act including with respect to the refugee status determination process, detention of refugees and asylum seekers and rights due to refugees and asylum seekers.<sup>139</sup> Illegal detention, in particular, features prominently as a lived experience for many refugees and asylum seekers.<sup>140</sup>

#### 4.4.2 Xenophobia in South Africa

Xenophobia can be defined as "hostility against foreigners in a given population, which can include attitudes, prejudices and behaviour that reject and exclude persons, based on the perception that they are outsiders or foreigners to a community, society or national identity."<sup>141</sup> Xenophobia poses a huge challenge for migrants in general in South Africa.<sup>142</sup> Remarks by public officials claiming that migrants are responsible for high levels of crime in South Africa contribute to the xenophobic attitudes towards many migrants regardless of

<sup>138</sup> Corruption Watch, 28.

<sup>139</sup> For instance: *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA); *Minister of Home Affairs v SASA* 2015 (SCA); *Bolanga v The Refugee Appeal Board and Others* 2015; *Tshiyombo v The Refugee Appeal Board and Others* 2015; *Mayemba v SCRA and Others* 2015; *Akanakimana v The Chairperson of the Standing Committee and Others* 2015; *CoRMSA v ABSA and others*- CoRMSA successfully challenged South African banks decision not to allow asylum seekers and refugees to open bank accounts. Court ordered banks to allow asylum seekers and refugees on Section 22 and Section 24 permits respectively to open bank accounts on condition that the Department of Home Affairs verifies the authenticity of these documents.

<sup>140</sup> Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa* (Pretoria: LHR, 2012). See also the following cases: *Minister of Home Affairs v Rahim and Others* [2016] ZACC 3; *Ersuno v Minister of Home Affairs* (69/2012) [2012] ZASCA 31 (28 March 2012); *Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209 (29 November 2011); *Minister of Home Affairs v Saidi* (294/2016) [2017] ZASCA 40 (30 March 2017); *Hussein and Another v the Additional Magistrate, Cape Town and Others*, 2014; *South African Human Rights Commission and Others v Minister of Home Affairs and Others*, 2014; *Power v Minister of Home Affairs and Others* (2013/14516) [2013] ZAGPJHC 146 (13 June 2013); *Lukombo v Minister of Home Affairs and Others* (2013/13552) [2013] ZAGPJHC 142 (13 June 2013); *Sikuola v Minister of Home Affairs and Others*; *Mzamo Attorneys & The State Attorney's Office*; *Ngoni v Minister of Police* (9198/2010) [2012] ZAWCHC 325 (8 October 2012).

<sup>141</sup> Department of Justice and Correctional Services, *National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 2016-2021, 7.

<sup>142</sup> E. Tendayi Achiume, "Beyond Prejudice: Structural Xenophobic Discrimination against Refugees," *Georgetown Journal of International Law* 45, no. 2 (2014): 323-382.

status.<sup>143</sup> The xenophobic attitudes prevalent throughout South Africa have led to outbreaks of violence against migrants, resulting in the loss of lives, destruction of property, and loss of livelihoods.<sup>144</sup>

The SAHRC's investigation into xenophobic violence in 2008 found that non-nationals were often subject to "intense discrimination and hostility from local communities - because South Africans blamed them for unemployment, access to housing and other economic goods and taking their women."<sup>145</sup> In addition, a study on violence against foreign nationals found that not only did a number of such crimes contain elements of xenophobia, but also that the reality of impunity for such crimes supported the development of xenophobia.<sup>146</sup>

For refugees and asylum seekers who fall under a different protection framework from other migrants, xenophobia impacts on their ability to access the rights they are entitled to. For instance, the SAHRC recently noted that xenophobia is one of the main challenges preventing refugees and asylum seekers from accessing basic services that they are entitled to.<sup>147</sup> The SAHRC found that a major challenge with dealing with xenophobia was the high level of impunity for crimes committed against non-nationals.<sup>148</sup> The Institute of Security Studies also argues that part of the problem with addressing xenophobia has been that many

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<sup>143</sup> For instance: Remarks by former Defence Minister, Joe Modise in 1998, quoted in Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-seekers, and Refugees in South Africa*, Human Rights Watch, 1998, 124: "As for crime, the army is helping the police get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who commit crimes and who are mistaken by some people for South African citizens. That is the real problem."

<sup>144</sup> SAHRC, *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-nationals*, accessed 11 June, 2018.

<https://www.sahrc.org.za/home/21/files/Report%20on%20the%20SAHRC%20Investigation%20into%20Issues%20of%20Rule%20of%20Law,%20Justice%20and%20Impunity%20arising%20out%20of%20the%202008%20Public%20Violence%20against%20Non-Nationals.pdf>

<sup>145</sup> SAHRC, *Report on the SAHRC Investigation*.

<sup>146</sup> UCT Refugee Rights Unit, "Expanding the Protection Space for Refugees: Criminal Case Watching Briefs for Access to Justice for Refugee Victims of Crime," *Working Paper Series* no. 2 (2011).

[http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Papers\\_2\\_of\\_2011.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_2_of_2011.pdf).

<sup>147</sup> SAHRC, "Medical Xenophobia-Public Hospitals Deny Migrants Healthcare Services," *SAHRC*, accessed 31 May, 2018. <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1229-medical-xenophobia-public-hospitals-deny-migrants-health-care-services-sahrc>.

<sup>148</sup> SAHRC, *Report on the SAHRC Investigation*.

political leaders legitimise rather than challenge xenophobic attitudes.<sup>149</sup> Where policy and legislative processes have been initiated, these have been slow in development.<sup>150</sup> The State has thus made limited progress in addressing xenophobia.

At the policy level, the South African government adopted the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) in 2019.<sup>151</sup> Initial consultations to draft the NAP began in 2001 shortly after the conclusion of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which was held in Durban the same year. The drafting process, however, took over 15 years to finalise. In May 2018, the Department of Justice and Constitutional Development introduced the Prevention and Combating of Hate Crimes and Hate Speech Bill to Parliament.<sup>152</sup> This was after a decade of campaigning spearheaded by lesbian, gay, bisexual, transsexual and queer (LGBTQ) activists.<sup>153</sup> While these are positive strides in creating a legal and policy framework to address xenophobia, it has taken the State a considerable amount of time to take these steps. It is also still too early to determine the impact that the law and policy will have in addressing xenophobia in South Africa.

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<sup>149</sup> Gareth Newham, “It is high time South Africans begin to tackle the problem of xenophobia for what it is – if only for the sake of self-interest,” interview by Peter Fabricius, *ISS Today*, 2 March 2017

<https://www.dailymaverick.co.za/article/2017-03-02-iss-today-xenophobia-once-again-jeopardises-south-africas-interests-in-africa/#.WzouhS2B18c>.

Echoing remarks by former Defence Minister Joe Modise quoted above, former President Zuma in the wake of the 2017 xenophobic violence in Pretoria and Johannesburg stated that “we cannot close our eyes to the concerns of communities that most of the crimes, such as drug-dealing, prostitution and human trafficking, are allegedly perpetrated by foreign nationals,” accessed 2 July, 2018 <https://citizen.co.za/news/south-africa/1439683/zuma-calls-for-calm-urges-residents-to-work-with-law-enforcement-agencies/>.

<sup>150</sup> Gareth Newham, “It is high time South Africans,”

<sup>151</sup> Department of Justice and Constitutional Affairs, *The National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*, accessed 20 January, 2020 <https://www.justice.gov.za/docs/other-docs/nap.html>.

<sup>152</sup> Portfolio Committee on Justice and Correctional Services, Prevention and Combating of Hate Crimes and Hate Speech Bill and International Crimes Bill: Briefing with Minister and Deputy Minister <https://pmg.org.za/page/Prevention%20and%20Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%20Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister> (Accessed 2 July 2018)

<sup>153</sup> *Cabinet Finally Approves Hate Crimes Bill* accessed 2 July 2018, <http://www.mambaonline.com/2018/03/20/cabinet-finally-approves-historic-hate-crime-bill/>

#### 4.5 The NHRIs in Kenya

Kenya has established three primary national human rights institutions that are similar in structure and function as those in South Africa. These are the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC or Gender Commission) and the Commission on Administrative Justice (CAJ). All three institutions have constitutional and legislative mandates. The Kenyan parliament recently initiated consultations to re-establish the institution envisaged in the 2010 Kenyan constitution, the Kenya National Human Rights and Equality Commission (KNHREC).<sup>154</sup> This commission had all the powers and functions of the KNCHR, the Gender Commission, and the CAJ, but the Kenyan parliament chose to operationalise Section 59(4) of the Constitution, which gave it the authority to enact legislation that would restructure the KNHREC into two or more separate entities.<sup>155</sup> Subsequently in 2011, Parliament passed three Acts creating three Commissions: the Kenya National Commission on Human Rights (successor to the KNCHR of 2002), the National Gender and Equality Commission (successor to the National Commission on Gender and Development) and the Commission on Administrative Justice.<sup>156</sup>

All three commissions derive their primary functions from Article 59 (1) of the Constitution but their respective enabling statutes are expounded on their specific mandates. Therefore, all have a human rights mandate but for instance, the KNCHR does not have a mandate on matters relating to equality and non-discrimination of ‘special interest groups.’<sup>157</sup> The term ‘special interest groups’ is not defined but is understood to include “minorities and

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<sup>154</sup> Davis Ayega, “Human rights bodies differ on proposed merger,” *CapitalNews*, May 8, 2018, <https://www.capitalfm.co.ke/news/2018/05/human-rights-bodies-differ-proposed-merger/>; Patrick Vidiya, “Don’t Panic, Merger Won’t Affect Roles: KNCHR tells NGEC and Ombudsman,” *The Star*, 9 May 2018, [https://www.the-star.co.ke/news/2018/05/09/dont-panic-merger-wont-affect-roles-knchr-tells-ngec-and-ombudsman\\_c1755909](https://www.the-star.co.ke/news/2018/05/09/dont-panic-merger-wont-affect-roles-knchr-tells-ngec-and-ombudsman_c1755909); Laws of Kenya, *The Constitution of the Republic of Kenya, 2010*, (Kenyan Constitution), Section 59(1).

<sup>155</sup> Kenyan Constitution, Section 59(2) and 59(4).

<sup>156</sup> Kenya National Commission on Human Rights Act 14 of 2011; National Gender and Equality Commission (NGEC) Act 15 of 2011; and the Commission on Administrative Justice Act 23 of 2011.

Note that Section 59 of the KNCHR Act 14 of 2011 provides Parliament with the authority to consider the amalgamation of the KNCHR with the Commission on Administrative Justice.

<sup>157</sup> KNCHR Act Section 8 (d) and (f).



marginalised persons, women, persons with disabilities, and children.”<sup>158</sup> In its 2016 Report on the status of equality and inclusion in Kenya, the Gender Commission indicated that special interest groups were children; the youth; women; people with disabilities; older members of society; and minorities and marginalised groups.<sup>159</sup> The KNCHR includes migrants under this group.<sup>160</sup> The terms “minorities” and “marginalised” have not explicitly included refugees or asylum seekers.<sup>161</sup> This has perhaps limited the extent to which rights of groups who are considered marginalised such as refugees, asylum seekers, migrants, sexual minorities and the internally displaced have been addressed by the commissions. The lack of clarity may on the other hand provide a wider scope for interpretation in terms of defining the groups of persons who would qualify as marginalised or minorities.<sup>162</sup>

In addition, the demarcation of the mandates is not necessarily as clear in practice. For instance, the KNCHR handles matters relating to sexual minorities, a category that would arguably fall under the mandate of the Gender Commission, as it is tasked with addressing gender equality and non-discrimination. The KNCHR has developed a comprehensive action plan to address sexual orientation and gender identity rights and partners with the regional network of African NHRIs (NANHRI) in the implementation of the rights-related activities focusing on sexual orientation and gender identity.<sup>163</sup> There is no evidence to indicate that either the KNCHR or the network of African NHRIs undertakes this work in collaboration with the Gender Commission. On the other hand, the Gender Commission and the KNCHR

<sup>158</sup> NGEC Act 15 of 2011 Section 8(c).

<sup>159</sup> National Gender and Equality Commission, *Status of Equality and Inclusion in Kenya, 2016*, (NGEC: Nairobi, 2016), 167.

<sup>160</sup> KNCHR, Migrants and Human Rights, <https://www.knchr.org/Our-Work/Special-Interest-Groups/Rights-of-Migrants>, accessed 11 June, 2018.

<sup>161</sup> The NGEC Act defines “marginalized group” as a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4) of the Constitution which include: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

<sup>162</sup> Courts have ruled that while the Constitution does not expressly refer to refugees, it must be understood that they form a vulnerable group in need of protection (*Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR 2 (*Kituo Cha Sheria*)).

<sup>163</sup> NANHRI, *Report on the Sexual Orientation and Gender Identity and Human Rights Kenya In-Country Workshop, 29-30 May 2017*, NANHRI: Nairobi, 2017, 20-25; From the available literature, there does not appear to be any form of collaboration with NGEC on SOGI matters.



have a close working relationship with respect to the rights of indigenous persons in Kenya.<sup>164</sup>

There are overlaps in the mandates of the three commissions but there is no clear strategy in place to ensure effectiveness in the promotion and protection of rights when overlaps occur. The discussions for the merger of the three NHRIs are yet to be concluded. However, the KNCHR is in favour of a merger, while the Gender Commission and Commission on Administrative Justice are opposed to the proposal, citing the threat to the independent functions that each commission performs.<sup>165</sup>

#### **4.5.1 The establishment of the Kenya National Commission on Human Rights**

The idea of the promotion and protection of human rights in Kenya by a specialised body was introduced in 1992 during Kenya's re-transition into a multi-party political system.<sup>166</sup> The promotion of such a specialised body developed in three distinct phases: pre-2002, between 2002 and 2010; and post-2010. Each phase is marked respectively by the adoption of a presidential decree, legislative act and the adoption of a new constitution.

The first phase resulted in the creation of the Standing Committee on Human Rights. This was followed by the creation of the Kenya National Commission on Human Rights by an Act of Parliament. The final phase was the creation of the Kenya National Human Rights

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<sup>164</sup> The KNCHR, NGEC and National Lands Commission together with indigenous persons' representatives and relevant governmental agencies are in the process of developing a National Action Plan to implement the 2014 World Conference on Indigenous Peoples' Declaration. Both the NGEC and KNCHR sit on a technical committee supported by the UN to promote the role of the rights of indigenous people in the implementation of SDGs in Kenya *NGEC and UNDESA in talks on role of indigenous peoples in the SDG framework* <http://www.ngeckkenya.org/news/6178/ngec-and-undesa-in-talks-on-role-of-indigenous-peoples-in-the-sdg-framework>. However, there are many aspects of the work undertaken by the KNCHR which make no reference to the NGEC and it appears that the KNCHR undertakes the bulk of the work related to the rights of indigenous people in Kenya. See e.g. UNDP, *Report on Mid Term Evaluation on UNDP's Realization of Human Rights and Access to Justice in Kenya Programme*, 2014, [https://info.undp.org/docs/pdc/Documents/KEN/Mid%20Term%20Review\\_Final%20Report%20\(2014\).pdf](https://info.undp.org/docs/pdc/Documents/KEN/Mid%20Term%20Review_Final%20Report%20(2014).pdf); KNCHR, *Submissions to the United Nations Permanent Forum on Indigenous Issues on Actions Taken or Planned Related to the Recommendations of the Permanent Forum, Implementation of UN Declaration on Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples*, [http://www.un.org/esa/socdev/unpfi/documents/2017/16-session/NHRIs/Kenya\\_Response.pdf](http://www.un.org/esa/socdev/unpfi/documents/2017/16-session/NHRIs/Kenya_Response.pdf);

<sup>165</sup> Davis Ayega, "Human rights bodies differ."

<sup>166</sup> Edwin Odhiambo-Abuya, "Past Reflections Future Insights: African Asylum Law and Policy in Historical Perspective," *International Journal of Refugee Law*, 51 (2007), 19. <http://digitalcommons.law.seattleu.edu/faculty/574...>

and Equality Commission through the adoption of a new constitution in 2010 and its subsequent split into three distinct institutions, which included the Kenya National Commission on Human Rights. These phases are discussed below.

### **The Standing Committee on Human Rights (1995-2002)**

In 1995, the President of the ruling party, the Kenya African National Union, established the Standing Committee on Human Rights (SCHR or Committee). This was later changed into a parliamentary committee in 1996.<sup>167</sup> The SCHR was empowered to investigate complaints of human rights violations, abuse of power and violations of fundamental rights and freedoms set out in the Kenyan Constitution.<sup>168</sup> It had the duty to educate the public and to raise the public awareness of human rights and freedoms.<sup>169</sup>

The SCHR consisted of ten committee members working on a part-time basis. However, the Committee had limited independence and powers as it was controlled by the Executive.<sup>170</sup> Its work was also hampered by limited financial and human resources.<sup>171</sup> As such it was criticised as having had limited influence on the human rights agenda in Kenya at that time.<sup>172</sup> Nonetheless, the Committee issued several private reports to the Executive and

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<sup>167</sup> Government of Kenya, *Gazette Notice No.3482 of 1996*.

<sup>168</sup> *Gazette Notice No 3482 of 1996*. The Standing Committee's functions were to

- "(a) to investigate complaints of alleged violation of fundamental rights and freedoms and to educate the public on human rights and freedoms in the Constitution;
- (b) to investigate complaints of alleged injustice, abuse of power and unfair treatment of any person by a public officer in exercise of his official duties;
- (c) to educate the public as to human rights and freedoms by such means as the committee deems fit including publication, lectures and symposia."

<sup>169</sup> See note 164 above.

<sup>170</sup> The SCHR was formed at the discretion of the President. He appointed its members, who reported only to him. The President decided on all actions to be taken and he had the powers to remove any of its members. See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa: Kenya*, 2001, 177.

<sup>171</sup> Chinedu Idike, "Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus," *Essex Human Rights Review* 1, no.1 (2004): 48 <http://projects.essex.ac.uk/ehrr/V1N1/Idike.pdf>

<sup>172</sup> Human Rights Watch, *Protectors or Pretenders?* 177.

published its first public report in 1998.<sup>173</sup> The report consisted of a general overview of human rights laws and definitions, as well as information on human rights abuses.<sup>174</sup>

The Committee largely focused its work on highlighting prison conditions in Kenya. It dealt with issues such as torture and ill-treatment, health services in prisons and prisoners' welfare.<sup>175</sup> In addition, the SCHR educated the public on human rights and put pressure on the Government to implement police reform.<sup>176</sup> It also coordinated the development and initial implementation of the National Action Plan on Human Rights (NAP), following up on the recommendations from the 1993 Vienna Conference on Human Rights.<sup>177</sup> Crucially, the SCHR, noting the limitations of its status, powers and limited autonomy, drafted the bill that eventually led to the establishment of its successor, the Kenya National Commission on Human Rights.<sup>178</sup> The SCHR laid important groundwork for the KNCHR with respect to prevention of torture and ill-treatment and addressing human rights abuses perpetrated by the police. These continue to be primary areas of work of the current KNCHR including with respect to refugee rights.

### **The Kenya National Commission on Human Rights (2002-2010)**

The Kenya National Commission on Human Rights was established in 2002 through the Kenya National Commission on Human Rights Act.<sup>179</sup> Its establishment led to the dissolution of the SCHR in 2002. There were broad consultations during the drafting of its founding legislation. The SCHR together with the Kenyan Attorney General consulted with the OHCHR, local civil society, and representatives from the Ugandan Human Rights

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<sup>173</sup> Chinedu Idike, "Deflectionism or Activism?" 46.

<sup>174</sup> Idike, "Deflectionism or Activism?" 46.

<sup>175</sup> Idike, "Deflectionism or Activism?" 46.

<sup>176</sup> Chinedu Idike, "Deflectionism or Activism?" 46.

<sup>177</sup> KNCHR, *It's Hard to be Good*, 10

<sup>178</sup> KNCHR, *It's Hard to be Good*, 10. The bill was drafted in 1998 but it took another four years before it was passed by Parliament in 2002

<sup>179</sup> Kenya Gazette Supplement, Acts, 2003, *Kenya National Commission on Human Rights Act, 2002*.

Commission and the South African Human Rights Commission when drafting the bill.<sup>180</sup> The resultant mandate reflected the minimum standards set out in the Paris Principles. This was confirmed by GANHRI when it accredited the KNCHR with an A status in 2005, only two years following the commencement of its duties.<sup>181</sup>

The KNCHR was a vast improvement on the SCHR in terms of composition, mandate and practice.<sup>182</sup> It was a statutory body with guarantees of independence, pluralism and security of tenure.<sup>183</sup> It was accountable to Parliament and had a broad human rights mandate.<sup>184</sup> It also had well-defined quasi-judicial powers.<sup>185</sup> It was established during a democratic transition in Kenya and it initially received a high-level of political support, as there was a general political will to promote a human rights agenda.<sup>186</sup> The KNCHR had a broad mandate that provided it with a strong basis to promote and protect the refugee rights. It was tasked with the promotion and protection of the rights of *any person*, it had the authority to visit places of detention, to ensure compliance with international human rights treaties and to perform any other functions it deemed necessary for the promotion and protection of human rights.<sup>187</sup>

### **The Kenya National Commission on Human Rights (2010-present)**

In 2010, Kenya adopted a new Constitution, which entrenched a national human rights institution referred to as, the Kenya National Human Rights and Equality Commission.<sup>188</sup>

However, parliament in terms of Section 59(4) passed legislation that created the Kenya

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<sup>180</sup> See comments of Attorney General, Amos Wako when debating the KNCHR bill in parliament in 2002. Kenya National Assembly Official Record (Hansard) 3 Apr 2002, 385-386.

<sup>181</sup> KNCHR, *It's Hard to be Good*, 2.

<sup>182</sup> Kithure Kindiki "On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment," *East African Journal of Human Rights and Democracy*, 2 (2004):122, cited in Francis B. M. Khayundi, *The Kenya National Commission on Human Rights and the Promotion, Protection and Monitoring of Socio-Economic Rights in Kenya*. (PhD diss., Rhodes University, 2017).

<sup>183</sup> *The Kenya National Commission on Human Rights Act, 2002 No. 9 of 2002*, Section 4, Section 6 (8)(a)-(b); Section 9; Section 11(3); Section 18.

<sup>184</sup> KNCHR Act, Section 16 (1) (a)-(i); Section 17; Section 22.

<sup>185</sup> KNCHR Act, Section 19; Constitution of Kenya (1963 as amended in 2008) Section 84(1).

<sup>186</sup> KNCHR, *Its Hard to be Good*, 2.

<sup>187</sup> KNCHR Act.

<sup>188</sup> The Constitution of Kenya, 2010, Chapter 4, Part 5, Section 59.

National Commission on Human Rights. The KNCHR has the competence to promote and protect human rights pursuant to Article 59(2) and Article 252 of the Constitution of Kenya read together with Section 7, 8 of the KNCHR Act. It retains the broad mandate granted to its predecessor and which meet the minimum standards prescribed by the Paris Principles. While it is mandated to work in close collaboration with the Gender Commission, it cannot receive and investigate complaints related to equality and freedom from discrimination.<sup>189</sup> Nor can the KNCHR report on compliance with international and regional obligations relating to the rights of groups protected under the law relating to equality and non-discrimination.<sup>190</sup>

The KNCHR Act details the Commission's composition, methods of operation and an open and transparent process of the appointment of Commissioners. The appointment process gives due regard to the principle of equality. It states in Section 11(13):

“In shortlisting, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.”<sup>191</sup> The Act provides for the appointment of five Commissioners, who serve only one six-year term and must be full-time.”<sup>192</sup>

The KNCHR's powers are provided for in Section 252 of the Constitution and Sections 26-28 and 31 of the KNCHR Act. It has considerable powers including the power to adjudicate on matters relating to human rights.<sup>193</sup> It also has the powers to investigate complaints, issue summons, to subpoena witnesses, to enter and search premises and to attach and remove articles or importance to its investigations.<sup>194</sup> The KNCHR is viewed as a credible institution but has been severely affected by a lack of political goodwill and financial and human resource constraints. This resulted in the undermining of its leadership, delays in the

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<sup>189</sup> KNCHR Act Section 8(d)(f)(h).

<sup>190</sup> KNCHR Act, Section 8.

<sup>191</sup> KNCHR Act, Section 11.

<sup>192</sup> KNCHR Act, Section 9.

<sup>193</sup> KNCHR Act, Sections 26-28.

<sup>194</sup> KNCHR Act, Sections 26-28.

appointment of new Commissioners when vacancies occurred and challenges in implementing programmes.<sup>195</sup>

The KNCHR's mandate does not expressly provide for the promotion and protection of refugee rights. However, in practice, the KNCHR has, similarly to the SAHRC, interpreted its mandate to include the promotion and protection of refugee rights. As a result, it has engaged in a variety of promotion and protection activities to advance these rights. Its role within the Kenyan refugee protection regime will be discussed in chapter 7.

#### **4.5.2 The National Gender and Equality Commission (Gender Commission)**

The Gender Commission derives its mandate from the Constitution and through its enabling legislation. It was established in accordance with Article 59 of the Constitution as part of the Kenya National Human Rights and Equality Commission (KNHREC). However, as mentioned above, the National Assembly opted to operationalise Section 59(4) of the Constitution, which gave the option of splitting the KNHREC into two or more separate entities.<sup>196</sup>

The Gender Commission has a broad mandate to promote and to protect the principle of equality and freedom from discrimination. It is the institution tasked with ensuring the State's compliance with its international and regional obligations relating to equality and freedom broadly and those relating to women, persons with disabilities, children and minorities or marginalised groups.<sup>197</sup> Its overall functions are quite similar to those of the KNCHR except to the extent that they focus on promoting and protecting equality. It has the powers to investigate any violations of the principle of equality and freedom from

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<sup>195</sup> KNCHR, *It's Hard to be Good*.

<sup>196</sup> Constitution of Kenya.

<sup>197</sup> National Gender and Equality Commission Act 2011 (the NGEC Act), Section 8.

discrimination.<sup>198</sup> It has additional powers to adjudicate on matters within its mandate, issue summons and to enter, search and seize articles relevant to its investigations.<sup>199</sup>

Its Act also prescribes the criteria for the appointment of Commissioners, which mirrors that of the KNCHR Act.<sup>200</sup> The selection and appointment process is independent, detailed and transparent.<sup>201</sup> Both Acts provide for full a complement of five Commissioners, who can only serve a six-year term on a full-time basis.<sup>202</sup> All Commissioners' tenure of office is guaranteed and removal from office must be done in accordance with the Constitution.<sup>203</sup>

Though its mandate is not as broad as that of the KNCHR, most of the provisions contained in its founding and enabling legislation reflect the minimum standards set by the Paris Principles. It has discharged both its promotion and protection mandate including through research, publication of reports and developing tools for promoting equality, including a model law on sexual and gender-based violence, and a performance and monitoring and evaluation toolkit on gender and equality mainstreaming. However, there is a dearth in scholarly literature on the functions of the Gender Commission and how it gives effect to its mandate.<sup>204</sup> Nonetheless, the abundant literature on the gender inequalities that refugees and asylum seekers face including those who are sexual minorities provide a basis to analyse the role that a specialised NHRI such as the Gender Commission can play within the refugee protection regime. Thus, the Gender Commission can potentially contribute to mitigating gender inequalities and discrimination experienced by refugees and asylum

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<sup>198</sup> NGEC Act, Section 8.

<sup>199</sup> NGEC Act, Section 26-28.

<sup>200</sup> NGEC Act, Section 11.

<sup>201</sup> NGEC Act, Section 11.

<sup>202</sup> NGEC Act, Section 9 and 14.

<sup>203</sup> Kenyan Constitution, Article 251.

<sup>204</sup> Available literature focus on capacity-building initiatives such as development of strategic plan, training of Gender Commissioners e.g. Atsango Chesoni Salome Muigai Karuti Kanyinga, *Promoting Women's Human Rights and Enhancing Gender Equality in Kenya*, Stockholm: SIDA, 2006 p37; and recommendations on how it should discharge its mandate e.g. Peter Nordström, "Gender and Reconciliation in the New Kenya: Equality at the Heart," *Policy Brief, Promoting Cohesion and Reconciliation in Kenya* no. 3, (July 2013).

seekers. The Gender Commission would also be an important institution in promoting an intersectional approach to addressing inequality and discrimination that refugees and asylum seekers face. This role will be discussed in chapter 7.

#### 4.5.3 The Commission on Administrative Justice

The Commission on Administrative Justice (CAJ), also known as the Office of the Ombudsman, is the third constitutional body established under Article 59 (4) of the Constitution. The recommendation to establish an Office of the Ombudsman was initially put forward in 1971 through a commission of inquiry into poor service delivery in the Kenyan public sector.<sup>205</sup> While this recommendation was never implemented, subsequent recommendations by the Kenya Anti-Corruption Commission and national policy documents led the President to establish the Public Complaints Standing Committee (PCSC) in 2007 as a Department within the Ministry of Justice.<sup>206</sup> The PCSC was mandated to enquire into allegations of misuse of office, corruption, and unethical conduct, breach of integrity, maladministration, delay, injustice, discourtesy, inattention, incompetence, misbehaviour, and inefficiency or ineptitude against public officers.<sup>207</sup> However, its powers were limited, it lacked independence and it was institutionally weak due to its establishment through a Gazette Notice.<sup>208</sup>

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<sup>205</sup> Christine Mango, “Remarks on Behalf of the Chief Justice, By: Prof. Christine Mango, Vice Chairperson, Judicial Service Commission,” in *Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions* (Nairobi: AOMA, 2013), 8  
[http://aoma.ukzn.ac.za/Libraries/External\\_reports/Kenya\\_Draft\\_Report\\_of\\_the\\_Regional\\_Colloquium\\_of\\_African\\_Ombudsmen.sflb.ashx](http://aoma.ukzn.ac.za/Libraries/External_reports/Kenya_Draft_Report_of_the_Regional_Colloquium_of_African_Ombudsmen.sflb.ashx)

<sup>206</sup> Commission of Administrative Justice, accessed 3 July 2018, <http://www.ombudsman.go.ke/ombudsman/about-us-page/>; Recommendations for the establishment of and Office of the Ombudsman were also put forward in the Kenya Vision 2030 and the Economic Recovery Strategy for Wealth and Employment Creation.

<sup>207</sup> Commission of Administrative Justice, <http://www.ombudsman.go.ke/ombudsman/about-us-page/>.

<sup>208</sup> Commission of Administrative Justice, <http://www.ombudsman.go.ke/ombudsman/about-us-page/>.



The Commission on Administrative Justice was constituted in 2011 as an independent institution, accountable to the Executive and to the National Assembly.<sup>209</sup> It derives its primary functions from the Constitution under Article 59 and its enabling legalisation, the Commission on Administrative Justice Act, 2011 (the Act).<sup>210</sup> Its primary mandate is to investigate “any conduct in State affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.”<sup>211</sup> It is also tasked with facilitating “the promotion and protection of the fundamental rights and freedoms of the individual in public administration.”<sup>212</sup> In addition, the Commission is required to discharge its mandate utilising a human rights-based approach. This is stipulated in its guiding principles contained in its founding Act, which states:

“In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect—

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) all treaties and conventions which have been ratified by Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.”<sup>213</sup>

Thus, the Commission on Administrative Justice has a more explicit human rights mandate than the South African Public Protector. This provides the Commission with a definitive basis to engage with the promotion and protection of refugee rights. Its role in this regard is pertinent given that the Kenyan government has taken over the administration of the refugee regime from the UNHCR. In particular, the challenges that the refugee protection regime faces, as discussed below, primarily result from the Kenyan government’s inaction or

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<sup>209</sup> Article 254 of the Constitution of Kenya requires statutory bodies to submit annual reports to the President and to the Parliament. Commission on Administrative Justice Act 23 of 2011, Section 8 requires the CAJ to report biannually to the Parliament on complaints investigated and remedial action taken.

<sup>210</sup> Laws of Kenya, *Commission on Administrative Justice Act 23 of 2011*.

<sup>211</sup> CAJ Act, Section 8.

<sup>212</sup> CAJ Act, Section 8(k).

<sup>213</sup> CAJ Act, Section 7.

implementation of its obligations either arbitrarily or in contravention to its international obligations. Its role within the refugee protection regime will be discussed in chapter 7.

The CAJ's other functions and powers are similar to those of the KNCHR and Gender Commission except for their focus on addressing maladministration and promoting administrative justice. It has the powers to investigate "any complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector."<sup>214</sup> It has in this regard jurisdiction to receive complaints in confidence and under seal, from persons in places of detention including prisons, remand or mental institutions.<sup>215</sup> Given the frequent arrest and detention of refugees and asylum seekers in Kenya, the potential role of NHRIs for accountability with respect to refugees and asylum seekers in places of detention is crucial.

The Commission has the powers to recommend compensation or other appropriate remedies against persons or bodies.<sup>216</sup> It has additional powers to adjudicate on matters within its mandate, issue summons and to enter, search and seize articles relevant to its investigations.<sup>217</sup> It has the additional function of enhancing social cohesion in Kenya, overseeing the implementation of relevant decisions of international tribunals such as the African Commission on Human and People's Rights (African Commission)<sup>218</sup> and overseeing

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<sup>214</sup> CAJ Act, Section 8(b).

<sup>215</sup> CAJ, *Role of CAJ in Promoting Access to Better Services in Kenya*, Nairobi: CAJ, 2017, accessed 4 July 2018 <http://www.kara.or.ke/CAJ%20presentation-KARA%20BTS%2058.pdf>.

<sup>216</sup> CAJ Act, Section 8.

<sup>217</sup> CAJ Act, Section 26 and 27.

<sup>218</sup> The CAJ is also overseeing the implementation of the *Endorois Case (The African Commission on Human and Peoples' Rights Communication - 276/03)* As indicated in African Ombudsman and Mediators Association (AOMA), *Draft Report of the Regional Colloquium of African Ombudsmen on Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions*, Nairobi, 19-21 September 2013 [http://Aoma.Ukzn.Ac.Za/Libraries/External\\_Reports/Kenya\\_Draft\\_Report\\_Of\\_The\\_Regional\\_Colloquium\\_Of\\_African\\_Ombudsmen.Sflb.Ashx](http://Aoma.Ukzn.Ac.Za/Libraries/External_Reports/Kenya_Draft_Report_Of_The_Regional_Colloquium_Of_African_Ombudsmen.Sflb.Ashx) P53; Also Frans Viljoen, "The African Human Rights And Domestic Enforcement," In *Social Rights Judgments and the Politics of Compliance: Making it Stick*, eds. Malcolm Langford, César Rodríguez-Garavito, Julieta Rossi (Cambridge: Cambridge University Press, 2017), 382. One of the recommendations to Kenya during its Universal Periodic Review (UPR) in 2010 was to implement the recommendations and decisions of its judicial institutions and those of the ACHPR especially those related to the rights of indigenous people. See OHCHR, *Report of the Working Group of the UPR: Kenya*. UN Doc A/HRC/15/8, 15 June 2010 Para 110.114.

the implementation and enforcement of the Access to Information Act.<sup>219</sup> This is another important function within the context of refugee rights as the African Commission receives complaints (known as communications) from refugees and asylum seekers. The African Commission for instance, has found that Kenya violated the rights of a refugee, but there is no record to indicate if its decision was implemented by the Kenyan government.<sup>220</sup>

The Commission on Administrative Justice discharges its mandate through issuing advisory opinions, complaints handling, publication of reports, conducting research, conducting investigation into systemic problems within the public sector.<sup>221</sup> It also litigates and acts as *amicus curiae*.<sup>222</sup> According to Section 9 of the Act, its membership comprises three Commissioners, one of whom is the Chairperson. The Act sets out the qualification requirements for the Chairperson and the Commissioners.<sup>223</sup> The appointment process is detailed, transparent and it is similar to the process of appointment for the Chairpersons and Commissioners for the KNCHR and the Gender Commission.<sup>224</sup> The National Assembly gives the final approval of nominees to the office.<sup>225</sup> The Commissioners serve a limited term of six years without renewal and do so on a full-time basis.<sup>226</sup>

The Commission has faced challenges in fulfilling its mandate. It has faced allegations of corruption, maladministration and is the subject of litigation to the detriment of its mandate.<sup>227</sup> It has noted the limited levels of awareness of its existence, role, and functions among the public and within the public sector especially the judiciary, has challenged the

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<sup>219</sup> AOMA, *Challenges and Prospects for African Ombudsman Institution*, 53; Access to Information Act 31 of 2016.

<sup>220</sup> ACHPR, *John D. Ouko v Kenya*, 232/99 (2000).

<sup>221</sup> The Office of the Ombudsman in Kenya, accessed 4 Feb 2020, <https://legalscholarsite.com/ombudsman-in-kenya/>.

<sup>222</sup> AOMA, *Challenges and Prospects*, 53.

<sup>223</sup> Commission of Administrative Justice Act, Section 10.

<sup>224</sup> CAJ Act, Section 11.

<sup>225</sup> CAJ Act, Section 11(7).

<sup>226</sup> CAJ Act, Section 14.

<sup>227</sup> CAJ, *Annual Report 2016*, accessed 4 July, 2018, <http://www.ombudsman.go.ke/annual-report/>.

extent to which it can effectively discharge its mandate.<sup>228</sup> Its work has also been hampered by poor financial resource allocation from the Government.<sup>229</sup> There is also a dearth of empirical literature on the Commission to determine its effectiveness either as an anti-corruption institution or a human rights institution, which would be especially important in the context of refugee rights given its mandate to oversee social cohesion and the implementation of relevant findings from international tribunals.

The Commission has developed strategies to overcome some of the administrative and institutional challenges it faces for instance, by developing an integrated referral system for complaints handling with other public institutions with a wider grassroots presence.<sup>230</sup> It also implements some of its key projects in partnership with UN agencies such as the UNDP and other aid agencies.<sup>231</sup>

#### **4.6 The refugee protection regime: Kenya**

Kenya has hosted refugees since the 1960s and was one of the States involved in the drafting of the 1969 OAU Refugee Convention.<sup>232</sup> Initial refugee flows began in the late 1960s and early 1970s and were from Uganda owing to the brutal regime under Idi Amin.<sup>233</sup> The number of Ugandan refugees was relatively low and many had relatives in Kenya.<sup>234</sup> Thus, many settled with relative ease and were readily absorbed into the country's economic sector.<sup>235</sup> Most Ugandan refugees acquired Kenyan identity cards and gained some level of access to social services such as education, health and housing.<sup>236</sup>

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<sup>228</sup> <https://legalscholarsite.com/ombudsman-in-kenya/> and CAJ, Annual Report, 2016.

<sup>229</sup> CAJ, Annual Report, 2016.

<sup>230</sup> CAJ, Annual Report, 2016.

<sup>231</sup> CAJ Annual Report 2016.

<sup>232</sup> Edwin Odhiambo-Abuya, "Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective," in *Refugees and Rights*, ed. Mary Crock (New York: Routledge, 2016), 440-41.

<sup>233</sup> Odhiambo-Abuya, "Past Reflections, Future Insights," 440-41.

<sup>234</sup> Odhiambo-Abuya, "Past Reflections, Future Insights," 440-41.

<sup>235</sup> Jeff Crisp, "The State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps." *African Affairs* 99 (2000): 616. <http://afraf.oxfordjournals.org/content/99/397/601.abstract>

<sup>236</sup> Jeff Crisp, "The State of Insecurity," 616

Kenya's refugee population increased significantly from the mid-1980s due to internal strife and civil war in Ethiopia, Somalia and South Sudan.<sup>237</sup> The severe drought in Ethiopia in 1985 also caused a significant number of Ethiopians to seek asylum in Kenya.<sup>238</sup> As a result, the refugee numbers grew exponentially, from 14,500 to 130, 000 in 1991.<sup>239</sup> By 1992, the number of refugees in Kenya stood at 420,000 and they were primarily from Somali, Ethiopia and Sudan (now South Sudan).<sup>240</sup> In 1994, the genocides in Rwanda and Burundi, coupled with civil conflict in the Democratic Republic of Congo led to large numbers of persons from these countries seeking asylum in Kenya.<sup>241</sup>

The figures for refugees and asylum seekers in Kenya have fluctuated from the height of the regional crises in the 1990s but have remained relatively high. Kenya currently hosts 421,248 officially registered refugees and 50,476 asylum seekers, though reports indicate that many are not registered.<sup>242</sup> A new wave of Ethiopian asylum seekers, estimated at 9,600, begun to arrive in March 2018, following unrest in the Oromo region of Ethiopia.<sup>243</sup> The majority of the refugees live in two refugee camps, that is, the Kakuma Refugee Camp (Kakuma), close to the border with South Sudan and the Dadaab Refugee Camp (Dadaab), close to the border with Somalia. A further estimated 65,000 registered refugees and asylum seekers live in urban areas.<sup>244</sup>

The evolution of the refugee protection regime in Kenya can be categorised into two phases. The first phase runs from independence in 1963 to the adoption of the new constitution in 2010 and the second phase is post-2010. These two phases are discussed below.

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<sup>237</sup> Edwin Odhiambo-Abuya, "Past Reflection, Future Insights..."441

<sup>238</sup> Odhiambo-Abuya, "Past Reflection, Future Insights..."441

<sup>239</sup> Jeff Crisp, "The State of Insecurity,"616.

<sup>240</sup> UNHCR, *UNHCR Statistical Yearbook 2017* (Geneva: UNHCR, 2018).

<sup>241</sup> UNHCR, *UNHCR Statistical Yearbook 2017*.

<sup>242</sup> Simon Konzolo, *An Overview of Refugee Status Determination and the Rights of Refugees in Kenya: The Protection Envisaged under the 2006 Refugees Act, Paper Prepared for Refugee Studies Centre Workshop on Refugee Status Determination and Rights in Southern and East Africa*, Refugee Consortium of Kenya.

<sup>243</sup> Wamuyu Maina, "Kenya's Refugee Policy Cries Out For Rethink," *The Daily Nation*, 21 March 2018.

<sup>244</sup> UNHCR, <http://www.unhcr.org/ke/urban-areas>.

#### 4.6.1 Domestic legal framework (1963-2010)

Kenya was a dualist State until 2010 when a new constitution was adopted. Therefore, treaties did not apply unless parliament passed domestic legislation or amended existing legislation to incorporate treaty provisions.<sup>245</sup> Despite having ratified the 1951 Refugee Convention and its protocol and the 1967 AU Refugee Convention in 1966, 1981 and 1993 respectively, Kenya only adopted legislation related specifically to refugees in 2006 through the Refugees Act No. 13 of 2006.<sup>246</sup> Discussions on the incorporation of international refugee law into domestic law had begun in the early 1990s, but there was limited political will to give effect to any rights, duties or obligations as prescribed by international and regional refugee law.<sup>247</sup>

In the absence of refugee specific legislation, matters related to refugees and asylum seekers were governed by the Immigration Act of 1967 and the Aliens Restriction Act of 1973.<sup>248</sup> Under the Immigration Act, classes of entry permits were provided for, under which a person could apply for entry into Kenya. Class M allowed for a refugee to apply for an entry permit. It also allowed the spouse or the child of the refugee to apply for the permit. The Class M entry permit states:

“A person who is a refugee, that is to say, is, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, unwilling to avail himself of the protection of the country of his nationality or who, not having a nationality and being outside the country of his former habitual residence for any particular reason, is unable or, owing to such fear, is unwilling to return to such country; and any wife or child over the age of thirteen years of such a refugee.”<sup>249</sup>

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<sup>245</sup>Nicholas Wasonga Orago, “The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective,” *African Human Rights Journal*, chapter 7, 2, no. 18(2013): 415-440; Joseph Maina, “Do Articles 2(5) and 2(6) of the Constitution of Kenya 2010 Transform Kenya into a Monist State?” SSRN, 30 September, 2013, <http://dx.doi.org/10.2139/ssrn.2516706>, Maina argues that Kenya adopts both elements of a monist and dualist State.

<sup>246</sup> Edwin Odhiambo-Abuya, “Past Reflections, Future Insights,” 440.

<sup>247</sup> Eva Ayiera, “Bold Advocacy Finally Strengthens Refugee Protection in Kenya,” in *Forced Migration Review* 28: 26-27.

<sup>248</sup> Edwin Odhiambo-Abuya, “Past Reflections, Future Insights,” 445.

<sup>249</sup> Laws of Kenya, *Immigration Act 1967*.

Section 5(2) of the Immigration Act set out the assessment procedures. Immigration Officers of the Ministry of State in the Office of the President were assigned the role to hear and to determine applications for refugee status. The Immigration Officer issued an entry permit upon satisfaction that the applicant met the refugee definition. Under the Act, an applicant was required to answer any question and to produce any document that would allow the Immigration Officer to ascertain whether they should be permitted entry into Kenya.<sup>250</sup> Even though the Act provided for an appeal to be lodged should an application be rejected, the Immigration Officer was not required to provide reasons for any decisions made.<sup>251</sup>

The Aliens Restriction Act of 1973 in Section 3, read together with rule 4, required all foreigners to report to a registration officer within 90 days of arrival in Kenya.<sup>252</sup> The registration process required foreigners to complete a form, which had a category for refugees. The registration process did not provide refugee status determination procedures. Both Acts did not provide for refugee rights, they only governed their entry into Kenya as non-nationals. They did not offer any safeguards. These only came into effect once the Refugees Act No. 13 of 2006 (Refugees Act) was promulgated. The Refugees Act repealed both the Immigration Act and the Aliens Restriction Act.<sup>253</sup>

The Refugees Act, similar to the South African Refugees Act, incorporates both the international and regional definitions of a refugee in its Section 3(1) and 3(2) respectively. In addition, Section 11(3) allows for the recognition of refugees *in situ*, for persons already lawfully present in Kenya. Furthermore, the Act prohibits the penalisation of asylum seekers for illegal entry, as long as they present themselves for refugee status determination, within the stipulated timeframe.<sup>254</sup>

The Act established a number of offices to manage refugee affairs in the country. It

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<sup>250</sup> Immigration Act, Section 11.

<sup>251</sup> Immigration Act, Section 8.

<sup>252</sup> Aliens Restriction Act of 1973, Section 3.

<sup>253</sup> Laws of Kenya, The Refugees Act no. 13 of 2006.

<sup>254</sup> Refugees Act, Section 11(3).

created the Secretariat of Refugee Affairs, to serve as the administrative hub for refugee matters.<sup>255</sup> The Act also created the office of the Commissioner for Refugee Affairs, who is the primary custodian for the implementation of all aspects of refugee affairs in Kenya. The Commissioner's comprehensive set of tasks relating to the promotion and protection of the rights of refugees, are set out in Section 7 of the Act.<sup>256</sup> These include formulating policy and implementing refugee law and policy in accordance with international standards.<sup>257</sup> The Commissioner is required, under the Act, to collaborate with UN Agencies and any other institutions to ensure that refugee rights are promoted and protected.<sup>258</sup> The Commissioner is also the person tasked with receiving and processing applications for refugee status. This specific role is undertaken with the assistance of a Refugee Affairs Committee.<sup>259</sup>

The Act recognises the principle of family reunification. Any members of family of a refugee may also be considered refugees.<sup>260</sup> The refugee can also apply to have members of his or her family outside Kenya, to reside with them.<sup>261</sup> Such family members will be granted the full rights and privileges of a refugee.<sup>262</sup> There is no prohibition for family members to apply for refugee status individually should they choose to do so.<sup>263</sup>

The Act provides specific protection for refugee women and children through Section 23. Section 23 (1) stipulates that the commissioner shall "ensure that specific measures are taken to ensure the safety of refugee women and children in designated areas." The commissioner shall also "ensure that a child who is in need of refugee status or who is considered a refugee shall, whether unaccompanied or accompanied by his parents or by any

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<sup>255</sup> Refugees Act, Section 6.

<sup>256</sup> Refugees Act, Section 7(1).

<sup>257</sup> Refugees Act, Section 7(2)(a)-(r).

<sup>258</sup> Refugees Act, Section 7.

<sup>259</sup> Refugees Act, Section 8.

<sup>260</sup> The Act in Section 2 defines members of family of a refugee as:

(a) any spouse of the refugee;

(b) any dependent child, brother or sister of the refugee under the age of 18 years; or

(c) any dependent grandparent, parent, grandchild, or ward living in the same household as the refugee.

<sup>261</sup> Refugees Act, Section 15(2).

<sup>262</sup> Refugees Act, Section 15(2).

<sup>263</sup> Refugees Act, Section 15(3).



other person, receive appropriate protection and assistance.”<sup>264</sup> The Commissioner is also required to ensure that unaccompanied refugee minors receive all necessary assistance to trace their parents or other family members to enable reunification of the family.<sup>265</sup> Where reunification is unsuccessful, the Commissioner must ensure that the unaccompanied refugee minor receives the requisite protection afforded to minors who have been deprived of their families.<sup>266</sup>

Additionally, the Act sets out the rights and duties of refugees and asylum seekers, though the rights of asylum seekers are not set out clearly. Section 16(1) states that “every recognized refugee and every member of his family in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party.” In addition, refugees are granted the right to work.<sup>267</sup> Both refugees and asylum seekers have the right to documentation.<sup>268</sup> Asylum seekers may also be required to reside in transit centres or refugee camps during their status determination process.<sup>269</sup>

The Act provides grounds for exclusion, cessation and withdrawal of refugee status while also reaffirming the principle of *non-refoulement* in Section 18. An amendment to the Act imposed a limit on the number of refugees and asylum seekers permitted to stay in Kenya. It set the threshold at 150,000, which could only be revised through Parliament, for a maximum of six months.<sup>270</sup> This provision was included following several attacks in Kenya by the Somali-based terrorist group, *Al-Shabaab*.<sup>271</sup> However, this provision was deemed

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<sup>264</sup> Refugees Act, Section 23(2).

<sup>265</sup> Refugees Act, Section 23(3)

<sup>266</sup> Refugees Act, Section 23(4)

<sup>267</sup> Refugees Act, Section 16(4)

<sup>268</sup> Refugees Act, Section 14(a)

<sup>269</sup> Refugees Act, Section 16(2)

<sup>270</sup> Refugees Act, Section 16A. This provision was included following an amendment to the principal Act in 2014 by the Security Laws (Amendment) Act No. 19 of 2014, s48

<sup>271</sup> A Parliamentary Committee report following the terrorist attacks at a Nairobi Mall, called for the repeal of the Refugees Act. The report was rejected by Parliament but has led to the review of the Refugees Act.

unconstitutional because it violated the principle of *non refoulement*.<sup>272</sup>

The Act contains inherent contradictions with respect to the rights accorded to refugees. According to the Act, every recognized refugee is entitled to the rights and is subject to the obligations contained in the international conventions to which Kenya is party.<sup>273</sup> However, in terms of law, refugees [and asylum seekers] are required to reside in camps. This restricts their movement and by implication their ability to earn a living and to access many other socio-economic rights.

In addition to the Refugees Act, the Kenyan National Action Plan on Human Rights (NAP) identifies refugees and asylum seekers as one of the vulnerable groups requiring particular attention with respect of rights promotion and protection. It notes that, “this substantial population necessitates a rights- based approach to ensuring the protection and assistance of refugees and asylum seekers *especially since Kenya has a policy of encampment* [Author’s own emphasis].”<sup>274</sup> The NAP reiterates the State’s commitment to “taking all appropriate measures to ensure the realisation of refugee rights in accordance with international refugee protection norms and standards.”<sup>275</sup>

In 2014, the Department of Refugee Affairs initiated a process to develop a National Asylum Policy, which would include the review of the Refugees Act.<sup>276</sup> A Refugee Bill was subsequently introduced to Parliament in July 2016 and passed in 2018. However, the

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<sup>272</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR para 427

<sup>273</sup> Refugees Act, Section 16.

<sup>274</sup> Office of the Attorney General and Department of Justice, *Sessional Paper No.3 of 2014, National Action Plan on Human Rights*, 24 April 2014.

<sup>275</sup> Office of the Attorney General and Department of Justice, *National Action Plan on Human Rights*, Priority actions identified within the National Action Plan are:

1. Developing and implementing a legal and policy framework to promote, protect and safeguard refugee and asylum seekers rights in line with the existing national and international legal frameworks with regard to the protection of refugees: Facilitating the meaningful contribution by refugees and asylum seekers to manage their own livelihoods and encourage self-reliance and dignity; and creating awareness on refugee issues to promote respect for refugee rights and harmonious co-existence.

<sup>276</sup> Refugee Consortium of Kenya, *Milestones in Refugee Management*, 2015.

President declined to sign it citing poor consultations with the public.<sup>277</sup> Nonetheless, the Bill proposes some significant and positive changes in the refugee protection framework.

It mandates a formal role for the Kenya National Commission on Human Rights. It envisions, in Section 7(1) (c) (viii), an advisory role for the KNCHR together with the UNHCR, and in Section 11 as a voting member of the Refugee Status Appeal Board. It provides in more detail the refugee status determination process and reinforces the legality of the identification documentation that an asylum seeker receives.<sup>278</sup> It does away with mandatory encampment, but it does give the Minister the powers to implement an encampment policy primarily targeting asylum seekers.<sup>279</sup> In addition, it guaranteed refugees and asylum seekers rights due to them under international law, including *non-refoulement*.<sup>280</sup> It also explicitly provided for the rights to access land, access education and to seek employment (for both refugees and asylum seekers).<sup>281</sup> The Bill is drafted in the spirit of integration for refugees in Kenya.

The amended Bill, The Refugees Bill, 2019, waters down many of the above provisions. It broadly provides for the rights and duties for refugees and asylum seekers.<sup>282</sup> It focuses on encampment, voluntary repatriation and resettlement of refugees and does away with many aspects of local integration contained in the 2016 version of the Bill.<sup>283</sup> It therefore reinforces the Kenyan government's stance of the temporary nature of its role as a refugee host country. The revised Bill retains a role for the KNCHR within the proposed Refugee Status Appeals Committee but removes its explicit reference as an advisory member of the

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<sup>277</sup> Samwel Owino, "Uhuru Refers Refugees Bill back to the House," *Daily Nation*, 9 November 2017.

<sup>278</sup> Refugees Bill 2016, Part III; Section 27(1).

<sup>279</sup> Refugees Bill 2016, Section 43 and 45.

<sup>280</sup> Refugees Bill 2016, Part V; Section 33(1).

<sup>281</sup> Refugees Bill 2016, Sections 34, 35 and 36.

<sup>282</sup> Kenya Gazette Supplement, No 126 (*National Assembly Bills No 62*) (*Refugees Bill 2019*), Section 28(1) [http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019_compressed.pdf), accessed 20 December, 2019.

<sup>283</sup> Refugees Bill 2019, Part IV.

proposed Refugee Advisory Committee.<sup>284</sup> The possible inclusion of the KNCHR as a member of the committee is left to the discretion of the members of the committee. Article 9(2) states: “The Committee may, when necessary, co-opt any person to attend the meeting of the Committee and advise it on the performance of its duties.”<sup>285</sup> The amended Bill was reintroduced to Parliament in September 2019 for debate, but is to be passed.<sup>286</sup>

#### 4.6.2 Refugee status determination process

Prior to the refugee influx that begun in the early 1990s, the Kenyan Government heard and determined all refugee claims based on policy. A Special Programme of Refugees (SPR) and an Eligibility Committee were set up within the Ministry of Home Affairs to deal with refugee matters.<sup>287</sup> The Special Programme of Refugees was tasked with the management of all matters related to the implementation of the national refugee policy, including the refugee status determination process.<sup>288</sup> An official and two assistants managed the SPR while the Eligibility Committee processed individual refugee claims. The committee’s members were drawn from the Ministry of Home Affairs, the Immigration Department and the UNHCR.<sup>289</sup> This arrangement proved problematic as the Immigration Department’s refugee mandate derived directly from legislation whereas the Ministry of Home Affairs, which was allocated the primary task of dealing with refugees, derived its mandate from Government policy.<sup>290</sup>

The Immigration Act and the Aliens Restriction Act, which formed the basis of the Kenyan asylum system, did not prescribe the procedures for determining refugee status. The Eligibility Committee thus developed its own procedures to process the asylum claims on an

<sup>284</sup> Refugees Bill 2019, Section 9(2), Section 11(2).

<sup>285</sup> Refugees Bill 2019, Section 9(2).

<sup>286</sup> Kenya Gazette Supplement, No 126 (*National Assembly Bills No 62*) (*Refugees Bill, 2019*), Section [http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019_compressed.pdf), accessed 20 December, 2019.

<sup>287</sup> Odhiambo-Abuya, “Past Reflection, Future Insights...” 70.

<sup>288</sup> Odhiambo-Abuya, 72.

<sup>289</sup> Odhiambo-Abuya, 70-73.

<sup>290</sup> Odhiambo-Abuya, 70-73.

individual basis.<sup>291</sup> The UNHCR's role was limited to that of a financial donor. It provided the financial assistance to the Government to set up and run a Refugee Reception Centre on the outskirts of Nairobi.<sup>292</sup> Recognised refugees would then receive official documentation signed by both the Minister of Home Affairs and the UNHCR.<sup>293</sup> The law was silent on entitlements, but practice suggests that they received treatment in accordance with international norms.<sup>294</sup> Thus, refugees could work, access education, had access to health care, enjoyed freedom of movement and were not subjected to *refoulement*.

The UNHCR conducted a parallel refugee status determination process based on its Statutes due to the absence of refugee specific legislation.<sup>295</sup> Thus, asylum seekers who were rejected by the Government would still have the possibility of being granted refugee status through the UNHCR, and were referred to as mandate refugees.<sup>296</sup> Mandate refugees were however, not eligible for any Government support, but they received support from the UNHCR.<sup>297</sup> Other refugees received limited assistance from the Government and relied heavily on NGOs for social assistance and access to employment.<sup>298</sup>

The Government's capacity to process individual applications collapsed due to the large influx of refugees.<sup>299</sup> It became impractical to process such large numbers of asylum applications in the existing Refugee Reception Centre, as the refugee numbers had increased dramatically from 14,000 to over 400,000 in two years.<sup>300</sup> The Government then began to abdicate its role to the UNHCR, and other NGOs specifically contracted by the UNHCR as

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<sup>291</sup> Odhiambo-Abuya, 70-73.

<sup>292</sup> Odhiambo-Abuya, "Past Reflections, Future Insights," 70-73

<sup>293</sup> Odhiambo-Abuya, 70-73

<sup>294</sup> Odhiambo-Abuya, 70-73

<sup>295</sup> Odhiambo-Abuya, 69

<sup>296</sup> Odhiambo-Abuya, 69

<sup>297</sup> Guglielmo Veridame, "Human Rights and Refugees: The Case of Kenya," *Journal of Refugee Studies* 2, no. 1, (1999): 54.

<sup>298</sup> Veridame, "Human Rights and Refugees," 56-57.

<sup>299</sup> Veridame, 56-57.

<sup>300</sup> UNHCR Statistical Year Book 2017.

implementing partners.<sup>301</sup> The UNHCR was thus requested to establish refugee camps where the refugees were located, resulting in the Government's complete handover of the refugee status determination process to the UNHCR from 1991.<sup>302</sup> The Kakuma and Dadaab camps were then established to cater for the refugee influx. This marked the end of the *laissez faire* approach to refugee protection that had characterised Kenya and the beginning of the encampment policy.<sup>303</sup> It also marked the loss of experience that the Government had acquired from directly handling refugee status determination.

The UNHCR adopted both the individual status determination process and the *prima facie* recognition of refugees due to the situation of mass influx.<sup>304</sup> Initially, the UNHCR delegated this role to an NGO in Nairobi (the Jesuit Refugee Services (JRS)). Where a person was granted refugee status, they would receive a letter confirming their refugee status and would then be required to relocate to the camps. On an exceptional basis, refugees would receive permission to remain in Nairobi. This led to the *de facto* implementation of the encampment policy by the UNHCR. Rejected applicants were required to leave the country. The process was conducted without any participation of Kenyan officials. The result was that a sense of apathy was developed, resulting in the abdication of the Government's protection obligations to refugees.<sup>305</sup>

Its protection obligations were eroded to the extent that the government refused to recognise the official refugee documents issued by JRS under the authority of the UNHCR.<sup>306</sup> Following the impasse, the JRS withdrew its services stating that it could no longer perform a function that was the responsibility of the Kenyan government and the UNHCR.<sup>307</sup> Faced with a government reneging on its international obligations, and reluctant to establish an

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<sup>301</sup> Veridame, "Human Rights and Refugees," 57.

<sup>302</sup> Veridame, "Human Rights and Refugees," 57.

<sup>303</sup> Veridame, 57.

<sup>304</sup> Sudanese and Somali refugees were declared *prima facie* refugees by the Kenyan Government in 1991

<sup>305</sup> Veridame, "Human Rights and Refugees," 57.

<sup>306</sup> Veridame, 58.

<sup>307</sup> Veridame, 58.

effective system to deal with refugees, the UNHCR took over refugee protection in its entirety even though it faced institutional challenges in undertaking this task.<sup>308</sup> This had ethical implications as the UNHCR took on the dual role of protecting refugees and implementing the Convention standards it was tasked with supervising.<sup>309</sup> In addition, there was no official acknowledgement by the Kenyan government that it recognised the UNHCR refugee status determination procedure.<sup>310</sup> The implications of this have been dire as many refugees and asylum seekers face harassment from police, arbitrary arrests and detention, despite having letters from the UNHCR, which the police often refuse to recognise.<sup>311</sup>

#### **4.6.3 Refugee status determination under the Refugees Act 2006**

With a system in shambles, the UNHCR together with CSOs began to lobby the government to adopt legislation that would ensure that the Government resumed its responsibilities with respect to the promotion and protection of refugee rights.<sup>312</sup> The promulgation of the Refugee Act in 2006 finally established the required legal framework, compliant with international norms and standards, to deal with refugees. In terms of the Act, the Commissioner with the assistance of the Refugee Affairs Committee is mandated to determine the status of refugees.<sup>313</sup> The Refugee Regulations set out the details of the process prescribed by the Act.<sup>314</sup>

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<sup>308</sup> Veridame, “Human Rights and Refugees,” 58. The UNHCR’s RSD process was found not to be in compliance with UNHCR’s own standard procedures for status determination set out in its Handbook for Status Determination. Interviews were conducted without due regard to facts but rather on impressions of the applicant by the Protection Officer. The same Protection Officer who conducted the initial (eligibility) interview also conducted the appeals process and reasons for rejection of applications were not usually provided.

<sup>309</sup> This dual role of role of ‘judge’ and ‘jury’ has been widely criticized. For a discussion on the Africa context see for example: Barbara Harrell-Bond and Mike Kagan, *The Road Home for Africa’s Refugees, Protecting the Rights of Refugees in Africa: Beginning with the UN Gatekeeper*, *Pambazuka News* 182, 11 November 2004

<sup>310</sup> Veridame, 58.

<sup>311</sup> Veridame, 58. See also Human Rights Watch, *Kenya: Police Abuse Somali Refugees: Government, UN, Donors Should Address Widespread Violence, Degrading Detention, Extortion, and Policing Failures*, June 17 2010, <https://www.hrw.org/news/2010/06/17/kenya-police-abuse-somali-refugees>

<sup>312</sup> Eva Ayiera, “Bold Advocacy Finally Strengthens Refugee Protection in Kenya,” 26-27.

<sup>313</sup> Refugees Act, Section 7 and 8.

<sup>314</sup> Laws of Kenya, “Refugees (Reception, Registration And Adjudication) Regulations, 2009 [L.N. No 24/2009.]”

An asylum seeker must present themselves for registration before the UNHCR and/or the Department of Immigration and Registration of Persons. It is at this stage, that a person requests asylum through a statement setting out the reasons for the asylum request.<sup>315</sup> The duty is placed on the asylum seeker to register, disclose information and surrender any relevant documentation. An eligibility interview then takes place with a qualified officer to determine whether the person meets the refugee definition thresholds. This is a non-adversarial process of information gathering procedure. Regulation 21 ensures confidentiality, sensitivity to gender, age and diversity. The burden of proof rests on the asylum seeker and the threshold is “reasonable likelihood” that the asylum seeker fits the definition of a refugee.<sup>316</sup>

In terms of the Act, it may take up to 180 days from the moment the Commissioner/Refugee Affairs Committee/the UNHCR receives the application for asylum before an interview can be conducted.<sup>317</sup> Refugee status is then conferred or rejected following the interview, a decision that must be communicated to the asylum seeker/refugee in writing, within fourteen days of the interview having taken place.<sup>318</sup> Asylum seekers have the right to appeal a negative decision. This must be done within 30 days of receiving the rejection.<sup>319</sup> The reasons for rejecting the application must also be communicated in writing.<sup>320</sup> In terms of the Act, the Refugee Appeals Board, which is an independent entity, hears all appeals.<sup>321</sup> The Courts, following exhaustion of the appeals process as set out by the Refugee Act, may also hear appeals.<sup>322</sup>

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<sup>315</sup> Refugees Act Section 11, Regulation Section 4.

<sup>316</sup> Simon Konzolo, *An Overview of RSD*.

<sup>317</sup> Refugees Act, Section 5.

<sup>318</sup> Refugees Act, Section 6(a) and (b).

<sup>319</sup> Refugees Act, Section 10.

<sup>320</sup> Refugees Act, Section 10.

<sup>321</sup> Refugees Act, Section 9.

<sup>322</sup> Refugees Act, Section 10(3).



The Department of Refugee Affairs began conducting refugee status determination interviews in 2011, five years after the Refugees Act had been passed, but the Department was still not operational.<sup>323</sup> The UNHCR therefore continued to conduct the registration and status determination interviews. A process was initiated in 2015 to transition the asylum process and refugee management fully to the Department of Refugee Affairs over the course of two years.<sup>324</sup> The transition process has yet to be finalized.<sup>325</sup>

#### 4.7 Key challenges within the refugee protection regime in Kenya

The Refugees Act of 2006 provides a protection framework that meets the minimum international norms and standards. It provides a clearer refugee status determination process and provides refugees and asylum seekers with important safeguards. However, in practice, its implementation has resulted in a precarious situation for many refugees and asylum seekers.<sup>326</sup> The limited prospects for durable solutions compounded by limited access to basic services and avenues for self-reliance have reduced many refugees and asylum seekers to poverty.<sup>327</sup> The limited support that government institutional structures tasked with managing asylum have received from the State, has also contributed to the protection challenges that refugees and asylum seekers in Kenya face. The key challenges faced include securitisation of asylum and xenophobia and are discussed below.

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<sup>323</sup> Madeline Garlick, Elspeth Guild, Caitlin Procter and Machiel Salomons, *Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*, Geneva: UNHCR, 2015, 41-43.

<sup>324</sup> Garlick, Guild, Procter and Salomons, *Formative Evaluation of the RSD Transition*.

<sup>325</sup> The author could not find any information at this stage, indicating that the process has been finalised. Interviews with participants indicated that the process was still in transition.

<sup>326</sup> Jeff Crisp. "The State of Insecurity."

<sup>327</sup> Sara Pavanello, Samir Elhawary and Sara Pantuliano, "Hidden and Exposed: Urban Refugees in Nairobi, Kenya," *HPG Working Paper* (2010), 8, accessed 26 August 2019, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>, Sorchá O'Callaghan and Georgina Sturge, 'Against all Odds: Refugee Integration in Kenya,' *Humanitarian Policy Group Working Paper*, December 2018, 5, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12542.pdf>.

#### 4.7.1 Securitisation of asylum and the encampment policy

A growing body of evidence attests to the securitisation of asylum regime in Kenya. Maina asserts that Kenya has always viewed refugees through a national security lens.<sup>328</sup> As discussed above, the Kenyan Government employs an encampment policy for refugees and asylum seekers. Under the original Refugees Act of 2006, the encampment policy was an option to be implemented at the discretion of the Minister. However, it was never pronounced in policy. Rather, the Kenyan government received a large influx of refugees from Sudan and Somalia from 1991, on the condition that they were settled in refugee camps.<sup>329</sup>

An amendment to the Refugees Act in 2014 by the Security Laws Amendment Act made it a requirement for refugees and asylum seekers to reside in camps with limited prospects for local integration.<sup>330</sup> The Kenyan Government's position is that the only viable durable solution for the refugee problem is repatriation.<sup>331</sup> This is despite the protracted conflicts in the countries of origin (with the exception of Rwanda). The result is that some refugees in Kenya are in protracted situations as they have been in camps since their arrival in the early 1990s.<sup>332</sup>

While Kenya generally adopted an encampment policy following the influx of refugees in the early 1990s, camps were located in both urban and remote areas close to the border with the primary countries of origin - South Sudan, Ethiopia and Somalia.<sup>333</sup> In the 1990s, the urban camps were closed and refugees could only receive limited assistance if they

<sup>328</sup> Andrew Maina, "Securitization of Kenya's Asylum Space: Origin and Legal Analysis of the Encampment Policy," in Johannes Dragsbaek Schmidt, Leah Kimathi, Michael Omondi Owiso, eds. *Refugees and Forced Migration in the Horn and Eastern Africa: Trends, Challenges and Opportunities*. (Switzerland: Springer, 2019), 88-89.

<sup>329</sup> Robert Doya Nanima, "An Evaluation of Kenya's Parallel Legal Regime on Refugees and the Courts Guarantee of their Rights," *Law, Democracy and Development* 21 (2017).

<sup>330</sup> Laws of Kenya, Security Laws Amendment Act No. 19 of 2014, Section 46. [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws\\_Amendment\\_Act\\_2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf)

<sup>331</sup> Andrew Maina, "Development of Refugee Law in Kenya," *World Policy Journal*, March 2016

<sup>332</sup> UNHCR, Dadaab complex- "A large part of the residents in the old camps (Ifo, Dagahaley, Hagadera) arrived in Dadaab in the 1990s and have children and grandchildren born in the camps." <http://www.unhcr.org/ke/dadaab-refugee-complex>, accessed 11 June, 2018; UNHCR, *Global Trends Report: 2018*, 22-23.

<sup>333</sup> Odhiambo-Abuya, "Past Reflection, Future Insights..." 441.

chose not to stay in the camps.<sup>334</sup> An amendment to the Refugees Act in 2014 formalised the encampment policy and required by law that all refugees and asylum seekers reside in camps.<sup>335</sup> The UNHCR manages the camps together with its implementing partners, with limited involvement from the government except for the RSD process.<sup>336</sup> The remoteness of the refugee camps and their location in areas of the country, which have traditionally been insecure, where the rule of law is weak and perpetrators of violence can act with a high degree of impunity, impinges directly on refugee protection.<sup>337</sup> The location of the refugee camps close to the borders of the primary refugee source countries has also exposed the refugees and asylum seekers to the risk of *refoulement*.<sup>338</sup>

In addition, the Kenyan Government has since the 1990s officially linked refugees with security concerns.<sup>339</sup> This has been used to justify the encampment policy and has led to the implementation of restrictive government policies targeting refugees, asylum seekers and other foreign nationals in the guise of dealing with security threats posed by aliens.<sup>340</sup> For instance, in 2007, despite evidence of new asylum seeker arrivals following the flare-up of conflict in Mogadishu, the capital of Somalia, the Kenyan government closed the border between Kenya and Somalia citing security concerns posed by the fleeing Islamic Courts Union militia.<sup>341</sup> However, the border closure did not stop Somali asylum seekers from fleeing into Kenya, as the border is highly porous.<sup>342</sup>

In addition, on 18 December 2012, the Ministry of Interior and Coordination of National Security issued a directive that stated:

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<sup>334</sup> Odhiambo-Abuya, “Past Reflection, Future Insights...” 441.

<sup>335</sup> Security Laws Amendment Act Section 46.

<sup>336</sup> Odhiambo-Abuya, “Past Reflection, Future Insights...” 441.

<sup>337</sup> Jeff Crisp, “The State of Insecurity,” 616.

<sup>338</sup> Jeff Crisp, “The State of Insecurity,” 616.

<sup>339</sup> Andrew Maina, “Securitization of Kenya’s Asylum Space,” 88-89.

<sup>340</sup> 1997 police operations following the President’s declaration that foreign spies and criminals masquerading as refugees had invaded Nairobi in *The East African* 22 July 1997.

<sup>341</sup> Simon Konzolo, *An Overview of RSD in Kenya*.

<sup>342</sup> Konzolo,

The Government of Kenya has decided to stop reception, registration and will close down all registration centres in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps. All asylum seekers and refugees from Somalia should report to Dadaab Refugee Camp while asylum seekers from other countries should report to Kakuma Refugee Camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer same services to the refugee camps.<sup>343</sup>

The government had also linked the proliferation of small arms and light weapons to the presence of refugees and asylum seekers within the country.<sup>344</sup> The terrorist attacks which increased in 2011 following Kenya's military intervention in Somalia, heightened the unsubstantiated views that refugees and asylum seekers were terrorists.<sup>345</sup> The result was the relocation of administration and service provision to camps.<sup>346</sup> A similar directive was issued on 16<sup>th</sup> January 2013.<sup>347</sup> Another directive was issued on 26 March 2014 on the basis that refugees were still residing in urban areas and must be moved back to the camps.<sup>348</sup>

The enforcement of these directives eradicated efforts that had been put in place to implement an urban refugee policy that recognised over 65,000 refugees residing in cities across the country.<sup>349</sup> Thus, the UNHCR was no longer able to provide assistance to

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<sup>343</sup> Robert Doya Nanima, "An Evaluation of Kenya's Parallel Legal Regime on Refugees and the Courts' Guarantee of their Rights," *Law, Democracy and Development*, 12 (2017): <https://dx.doi.org/10.4314/ldd.v21i1.3>.

<sup>344</sup> Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya*, New York: HRW, 2002; Government of Kenya, Kenya National Action Plan for Arms Control and Management, accessed 4 July, 2018, <https://www.files.ethz.ch/isn/124869/Kenya-National-Action-Plan-2006.pdf>.

<sup>345</sup> Human Rights Watch, *You Are All Terrorists: Kenyan Police Abuse of Refugees in Nairobi*, New York: HRW, 2012; Oscar Muriuki, Xenophobia and the Challenges of Managing Asylum System in a "Securitised" Environment," *Refugee Insights*, No 25, 2014 p 4-6; Hussein Mohammed, "Closing Dadaab Camp Not A Solution To Terrorism," *Standard Digital*, 7 May 2018 <https://www.standardmedia.co.ke/article/2001279541/closing-dadaab-not-a-solution-to-terrorism> (Accessed 3 July 2018); Eric Blanco Niyitunga, "Impact of 'Global War on Terror' on the rights of refugees and Asylum seekers in the horn of Africa - an analysis of the Somali refugees and Asylum seekers in Kenya," *Africa Insights*, 45, Issue 3 (December 2015): 46-62.

<sup>346</sup> Government of Kenya, *Department of Refugee Affairs Press Release*, 18 December 2012, <http://kenyalaw.org/caselaw/cases/view/84157>

<sup>347</sup> Doya Nanima, "An Evaluation of Kenya's Parallel Legal Regime on Refugees."

<sup>348</sup> Nanima, "An Evaluation of Kenya's Parallel Legal Regime on Refugees. See also *Press Statement by Cabinet Secretary for Interior and Coordination of National Government on Refugees and National Security Issued on 26<sup>th</sup> March 2014*, [https://www.hrw.org/sites/default/files/related\\_material/PRESS%20STATEMENT%20BY%20CABINET%20SECRETARY%20FOR%20INTERIOR%20%20COORDINATION%20OF%20NATI%20%20%20.pdf](https://www.hrw.org/sites/default/files/related_material/PRESS%20STATEMENT%20BY%20CABINET%20SECRETARY%20FOR%20INTERIOR%20%20COORDINATION%20OF%20NATI%20%20%20.pdf)

<sup>349</sup> UNHCR, *Statistical Yearbook 2017*.

registered asylum seekers and refugees in Nairobi, leaving them extremely vulnerable. Those outside the capital city and in other urban areas did not receive any form of assistance but would have been able to do so when in Nairobi. However, this Directive was successfully challenged in court on the grounds that the closure of the urban refugee centres infringed on the right to dignity of refugees and asylum seekers; it violated their freedom of movement; it exposed them to a level of vulnerability inconsistent with the State's duty to take care of persons in vulnerable circumstances; and that it exposed them to the risk of *refoulement*.<sup>350</sup>

In 2013, the Kenyan government, together with the Somali government and the UNHCR signed a tripartite agreement to repatriate Somali refugees, despite the on-going conflict in Somalia.<sup>351</sup> Under the agreement, Somali refugees would be repatriated to safe areas in Somalia.<sup>352</sup> The agreement was signed shortly after the *Al-Shabaab* terrorist attack in Nairobi, whose perpetrators the government alleged had used the Dadaab Refugee Camp as a base.<sup>353</sup> The agreement continues to be implemented with the UN confirming that the aim is to eventually close down the Dadaab Refugee Camp.<sup>354</sup>

In 2014, following the third directive, Kenya began to implement a more restrictive compulsory encampment policy based on the amended Refugees Act.<sup>355</sup> Had the amended Act not been found unconstitutional, an infringement would have incurred a penalty of a six-

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<sup>350</sup> *Kituo Cha Sheria* (Legal Advice Centre) Case.

<sup>351</sup> UNHCR, *Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013*, accessed 3 July, 2018, <http://www.refworld.org/docid/5285e0294.html>.

<sup>352</sup> UNHCR, *Tripartite Agreement*.

<sup>353</sup> Hawa Noor, "Repatriation of Somali Refugees from Kenya and the Principle of *Non-refoulement*," *Pambazuka News*, February 5, 2014, <https://www.pambazuka.org/human-security/repatriation-somali-refugees-kenya-and-principle-non-refoulement>.

<sup>354</sup> Kevin J Kelley, Dadaab Camps Closure on Target, says UN," *Daily Nation*, 2 March, 2017, <https://www.nation.co.ke/news/Daadab-camps-closure-on-target-says-UN/1056-3834216-10nkrffz/index.html>

<sup>355</sup> Security Laws (Amendment) Act 2014, Section 48. The Kenyan High Court in a ruling delivered in February 2015, found Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006, which sought to cap the number of refugees in the country to 150,000, unconstitutional for violating the principle of *non-refoulement* as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution. This ruling was upheld on appeal by the Government.

month jail term, a fine of 20,000 Kenyan shillings (approximately \$200), or both.<sup>356</sup> While the directives affected the entire refugee and asylum seeker population in Kenya, the primary target of the enforcement were those of Somali origin. Thousands of ethnic Somalis, regardless of their nationality or legal status, were arrested across the country following the issuance of these directives in an operation called *Usalama Watch* (Security Watch), resulting in illegal detention, arbitrary arrest and forcible removals to the Dadaab Refugee Camp.<sup>357</sup>

The cumulative effect of these directives and subsequent actions to implement them resulted in a significant number of Somali refugees repatriating, both officially and on their own volition, despite the risk of *refoulement*.<sup>358</sup> In 2015, after another *Al Shabaab*-linked attack at a local university located in a border town near Somalia, the government ordered the closure of the Dadaab Refugee Camp, the repatriation of all its residents and disbanded the Department of Refugee Affairs in May 2016.<sup>359</sup> A court order subsequently stopped the Government from closing the camp and disbanding the Department of Refugee Affairs.<sup>360</sup> It would have resulted in the involuntary repatriation and the possible *refoulement* of over 240,000 Somali refugees, in contravention of Kenya's refugee law and international obligations.<sup>361</sup>

#### 4.7.2 Xenophobia in Kenya

The securitisation of the refugee problem has also led to increasing levels of xenophobia.<sup>362</sup> While refugees, asylum seekers and migrants are not subjected to levels of violence similar to what occurs in South Africa, it is the xenophobic stance within the political spheres that has

<sup>356</sup> Andrew Maina, "Development of Refugee Law in Kenya," *World Policy Journal*, March 2016

<sup>357</sup> Human Rights Watch, *Kenya: Counterterrorism Operations Undermine Rights, No Justice for Security Force Abuses*, accessed 10 June 2018 <https://www.hrw.org/news/2015/01/29/kenya-counterterrorism-operations-undermine-rights>

<sup>358</sup> Amnesty International, *Not Time To Go Home: Unsustainable Returns of Refugees to Somalia*, (London: Amnesty International, 2017)

<sup>359</sup> Human Rights Watch, *World Report 2018: Events of 2017* (New York, Human Rights Watch: 2017) 383

<sup>360</sup> The Court found that, "The government's decision specifically targeting Somali refugees is an act of group persecution, illegal, discriminatory and therefore unconstitutional

*Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR

<sup>361</sup> UNHCR, *Statistical Yearbook*, 2017

<sup>362</sup> National Action Plan on Human Rights, 36.

led to the impasse in creating an environment conducive to implementing progressive asylum policies in Kenya.<sup>363</sup> It is quite common for politicians to make xenophobic pronouncements about refugees and asylum seekers.<sup>364</sup> This includes distorting facts about refugees, citing humanitarian aid that refugees and asylum seekers receive as discriminatory against host communities, blaming refugees for crime and competition for scarce economic opportunities.<sup>365</sup>

This has led to hostility towards refugees and asylum seekers and many face persistent police harassment, arbitrary arrests, illegal detention and extortion of bribes.<sup>366</sup> To sum the situation as one legal expert on a Task Force to review the Refugees Act of 2006 stated: “Such a heightened atmosphere is neither favourable nor conducive to constructive discussions on refugee rights and legal frameworks.”<sup>367</sup>

#### 4.8 Conclusion

This chapter has provided an overview of the key national human rights institutions in South Africa and Kenya. It also discussed the situation of refugees and asylum seekers in both countries and the resultant evolution of the respective refugee domestic protection regimes. This chapter also discussed the key protection challenges that have manifested within the refugee protection regimes in South Africa and Kenya. This provides the backdrop for the discussion in the following chapters on the how the respective NHRIs have discharged their mandates to give effect to the promotion and protection of refugee rights.

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<sup>363</sup> Oscar Muriuki, “Xenophobia and the Challenges of Managing Asylum System in a “Securitised” Environment,” in *Refugee Insights*, no. 24, (2014): 4.

<sup>364</sup> Muriuki, “Xenophobia and the Challenges of Managing Asylum,” 4-6.

<sup>365</sup> Muriuki, 4-6.

<sup>366</sup> KNCHR, KNCHR, *Return of the Gulag: Report of KNCHR investigations on Operation Usalama Watch, July 2014* (Nairobi: KNCHR, 2014).

<https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20Operation%20Usalama%20Watch.pdf?ver=2018-06-06-194906-830>

<sup>367</sup> Kituo Cha Sheria, “Closing Dadaab’ Conference, Rift Valley Institute, 29th April 2015,” cited in Regional Durable Solutions Secretariat (ReDSS) / Samuel Hall, “Devolution in Kenya: Opportunity for Transitional Solutions for Refugees? Analysing The Impact of Devolution on Refugee Affairs In Refugee Hosting Counties, 2015,” 52.

## Chapter 5

### Research Methodology

#### 5.1 Introduction

This chapter presents this study's research methodology. The research methodology provides a justification for the choice of the non-doctrinal research approach and discusses the primary data collection process. This includes a discussion of this study's research design, the data collection approach, the ethical considerations that were addressed and the limitations of this study.

#### 5.2 Research approach

Considering the research questions, this study utilised a non-doctrinal approach as the methodological framework and employed a qualitative research design.<sup>1</sup> According to Vibhute and Aynalem, in the non-doctrinal legal research approach, "the researcher tries to investigate through empirical data, how law and legal institutions affect or mould human attitudes and what impact on society they create."<sup>2</sup> This type of research is much broader with questions not necessarily available in conventional legal sources such as case reports, legal periodicals or statutory materials.<sup>3</sup> Thus, the researcher is usually required to undertake fieldwork to collect data to answer the research questions.

A research approach or design refers to the plan, structure and strategy of investigation used to obtain the answers to the research questions.<sup>4</sup> Simply stated, it is a plan

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<sup>1</sup> While non-doctrinal legal research is the primary approach that the researcher adopted, it must be noted that there are elements of the doctrinal legal research within the study, for instance the discussion in Chapter two on the international refugee law regime. Vibhute and Aynalem (2009, 97-98) and McConville and Chui (2007, 19-21) caution that the approaches are not mutually exclusive but rather that emphasis lies on the use of empirical methods in non-doctrinal legal research. Vibhute and Aynalem, *Legal Research Methods: Teaching Material*, 2009 [chilot.wordpress.com](http://chilot.wordpress.com); Mike McConville and Hong Wing Chui, ed. *Research Methods for Law*. Edinburgh: Edinburgh University Press, 2007.

<sup>2</sup> Vibhute and Aynalem, *Legal Research Methods*, 87.

<sup>3</sup> Vibhute and Aynalem, *Legal Research Methods*, 85-98.

<sup>4</sup> Vibhute and Aynalem, *Legal Research Methods*, 133.



that lays out why and how research will be conducted.<sup>5</sup> For this study, the following processes were undertaken to implement the research approach: formulation of the objectives and conceptualisation of the research questions, desk review, population and sampling, ethical approval, primary data collection and data analysis, identification of the limitations of the study. The research approach involved a desk review and primary data collection.

### **5.3 Desk review**

The desk review involved library search of books, journals, internet sources, reports, policy documents, government gazettes and newspaper articles. It also included analysing relevant international and regional human rights instruments, soft law, various pieces of legislation and cases. The information from the desk review contributed to the identification of the normative and implementation gaps within the international refugee protection regime. This in turn highlighted the role that NHRIs could play to address the protection issues linked to refugees and asylum seekers. This information provided the basis for a critical review of theoretical and legal frameworks that underpin the evolution of NHRIs, an overview of the international refugee protection regime, State responsibility and legally binding obligations. It also informed the discussion on the overview of the legislative frameworks of the NHRIs in South Africa and Kenya.

### **5.4 Population and sampling**

This section describes the population and sampling for this study. The population for this study included refugees, CSOs and NHRIs from which the participants were selected. For the refugee participants, the inclusion criteria was: a refugee who had participated, within the past ten years, in an NHRIs' activities such as lodging a complaint, attending an outreach/community advocacy activity or being part of an NHRI's research or education initiatives. The refugee participants were recruited through refugee communities. For the

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<sup>5</sup> Kristina Simion, *Practitioner's Guide: Qualitative and Quantitative Approaches to Rule of Law Research*, (INPROL, 2016), 5.

service provider participants, the inclusion criteria was: staff who were assigned to work on refugees matters, had handled complaints relating to refugees, had done any substantive research on refugees or advocacy for refugee rights, or were knowledgeable about NHRIs. For participants from NHRIs, the inclusion criterion was similar to that of service provider participants. The service provider and NHRI participants were recruited through introductory letters.

Thus, this study included the following categories of participants: *Refugees who had participated in a national human rights institution's activity*, or who had engaged with a service provider [through for instances seeking services] that had a working relationship or knowledge about national human rights institutions; *representatives from CSOs providing services* to refugees and asylum seekers who were familiar with national human rights institutions and other organisations or institutions working with national human rights institutions (referred herein as service providers); and *representatives from national human rights institutions* working directly on matters related to refugees and asylum seekers or within a unit that would handle such matters either through research, advocacy or complaints handling.

Nineteen (19) participants were interviewed, of which seven were refugees, nine were service providers and three were staff from NHRIs. Of the service providers, five worked exclusively with refugees and asylum seekers, while two focused on human rights broadly, but also implemented specific programmes for refugees and asylum seekers. The table below provides a summary of the participants:

	<b>South Africa</b>	<b>Kenya</b>
Refugees	4	3
Service providers	5	4
NHRI	2	1
<b>Total</b>	<b>11</b>	<b>8</b>

Table 1: List of participants

The sample size for study was small due to the following factors. Saturation was achieved after 16 interviews with service provider and refugee participants were conducted. According to Creswell, saturation refers to the point during data collection that the information stops giving new insights.<sup>1</sup> This means that at a given point the service provider and refugee participants were giving similar information about the questions being asked.

In addition, the CSO participants who met the selection criteria were few and were selected from a pool of relatively few CSOs, as the national number of CSOs providing services to refugees and asylum seekers, and who were accessible to the researcher or agreed to participate in the study were few. Very few service providers were implementing programmes with NHRIs or referring clients [refugees and asylum seekers] to NHRIs for assistance. Additionally, few members of the refugee communities had participated in NHRI-related activities within the past ten years or were aware of a refugee who had. This, as the research determined, was due to the fact that refugees and asylum seekers sought redress or services primarily through CSOs.

In Kenya, the operational context generally excludes NHRIs; therefore, there is limited substantive interaction among service providers with NHRIs outside of the referral mechanisms. In addition, the NHRIs have not established units or offices within the refugee camps though most service providers operate primarily from the refugee camps. Thus, those refugees who participated in the study resided in Nairobi and were referred to the researcher through CSOs or by word of mouth.

The sample for this study was drawn from Durban, Cape Town and Johannesburg (South Africa) and Nairobi (Kenya). The criterion for selection was a location with an NHRI office and a relatively high presence of refugees. In the case of South Africa, the three NHRIs

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<sup>1</sup> John Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (London: Sage, 2014), 296.

included in the study have their largest offices in the three main metropolises (Durban, Cape Town and Johannesburg). In addition, South Africa adopts an urban refugee policy with patterns of refugee settlement being primarily in these three main cities. In Kenya, all three NHRIs have primary locations in Nairobi with limited presence outside the capital city. Kenya adopts an encampment policy but has a large urban refugee population. Therefore, the likelihood that the NHRIs implemented activities in Nairobi that had a bearing on refugee rights was higher than within the refugee camps. The refugee camps were thus excluded as study sites.

As the above population categories indicate, the researcher purposively selected participants who met the inclusion criteria, that is, familiarity with national human rights institutions within the refugee protection context and/or currently working or have worked with a national human rights institution. Thus, a purposive sampling method was employed to purposively select participants that have the attributes that best contribute to this study.<sup>2</sup> Purposive sampling is defined as the intentional selection of informants based on their ability to elucidate a specific theme, concept, or phenomenon.<sup>3</sup> The general principle it embodies is “think of the person or place or situation that has the largest potential for advancing your understanding and look there.”<sup>4</sup> One of the main advantages of purposive sampling is that it provides greater depth of information.<sup>5</sup> In the case of this study, participants selected were those who had interacted with or were familiar with national human rights institutions.

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<sup>2</sup> A.S. de Vos, ed., *Research at Grassroots: For the Social Sciences and Human Service Professions 4<sup>th</sup> edition* (Pretoria: Van Schaik, 2011), 392.

<sup>3</sup> Rebecca S. Robinson, “Purposive Sampling,” in *Encyclopedia of Quality Life and Well-Being Research* ed., Alex C. Michalos (Dordrecht: Springer, 2014) doi: [https://doi.org/10.1007/978-94-007-0753-5\\_2337](https://doi.org/10.1007/978-94-007-0753-5_2337).

<sup>4</sup> Ted Palys, “Purposive Sampling,” in *The Sage Encyclopedia of Qualitative Research Methods*, (Vol.2), ed. L. M. Given (Los Angeles: Sage, 2008), 697-8.

<sup>5</sup> Earl Babbie and Johann Mouton, *The Practice of Social Research* (Cape Town: Oxford University Press, 2001), 166.

Thus, the NHRI representatives recruited were those who were assigned duties that related specifically to the promotion and protection of refugee rights or had worked on an activity related to refugee rights. All NHRIs received an introductory letter requesting participation in the study. The SAHRC, the CGE and the KNCHR responded affirmatively and a participant from each of the NHRIs was interviewed. No responses were received from the Public Protector, the NGEC and the CAJ. Therefore, the desk review supplemented the interviews where participants referenced the work of the Public Protector, the NGEC and the CAJ served as the source of data.

The service providers were selected based on their mandate - either providing services exclusively to refugees and asylum seekers, or, services to refugees and asylum seekers formed part of their primary activities. The total number of CSOs invited to participate in the study was eleven but only nine agreed to participate. The list of participants is included as Appendix 8.

### **5.5 Primary data collection approach**

The primary data was drawn from transcripts from interviews with research participants in South Africa and Kenya. This study employed semi-structured interview schedules as the data collection instruments [See Appendices 5-7]. Three different interview schedules were developed for the three categories of participants, that is refugees, service providers and staff from NHRIs. The interview schedules were designed in relation to the research questions. Each interview was recorded digitally with the consent of all participants. This was done to avoid extensive note taking during the actual interview, thereby allowing the researcher to fully engage with the interviewing process. Each interview lasted approximately 40 minutes. All interviews were conducted in English, as all the participants were fully conversant with the language. No translations or interpreters were required for this study.

The interviews were conducted either face-to-face or telephonically. Those conducted telephonically were due to convenience for the participant or where the researcher had limited access to the participant due to logistical constraints. Data was collected over a period of eight months (September 2018 to March 2019). This was done in two phases: the first phase with participants in South Africa and the second phase with participants in Kenya.

### 5.6 Primary data analysis

Data analysis is the process through which researchers make sense of their data.<sup>6</sup> In qualitative research, this means looking for patterns of ideas or themes.<sup>7</sup> This study followed guidelines from Tesch's thematic data analysis approach.<sup>8</sup> Thematic analysis is defined as a method for identifying and interpreting patterns of meaning across qualitative data.<sup>9</sup> For this study, the thematic analysis involved transcription of all interviews; coding, searching for themes, reviewing themes, defining and naming themes, development of a framework for the presentation of the findings; writing up the findings following the framework; and lastly, comparing and contrasting the findings with previous research or existing theories as discussed in the literature review, that is, a process of triangulation.<sup>10</sup> Data from the interviews was reviewed and common themes from the responses were grouped together.

The result of the thematic analysis of the data was the identification of six main themes, which informed the discussion of the findings in chapter six and chapter seven. Themes are the central organising ideas that answer the research question, and may be constituted of a collection of ideas known as sub-themes.<sup>11</sup> Sub-themes are themes within a

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<sup>6</sup> Pranee Liamputtong, ed., *Research Methods in Health: Foundations for Evidence-based Practice* 2<sup>nd</sup> Edition, (Oxford: Oxford University Press, 2013), 366.

<sup>7</sup> Liamputtong, *Research Methods in Health*, 366.

<sup>8</sup> Renata Tesch, *Qualitative Research: Analysis Types and Software Tools* (Falmer: New York, 1992), 142-145.

<sup>9</sup> Victoria Clarke and Virginia Braun, "Thematic Analysis," in *Encyclopedia of Quality of Life and Well-Being Research* ed. A.C Michalos (Dordrecht: Springer, 2014).

<sup>10</sup> Victoria Clarke and Virginia Braun, "Thematic Analysis."

<sup>11</sup> Victoria Clarke and Virginia Braun *Successful Qualitative Research: A Practical Guide for Beginners*. (London: Sage, 2013) 224

theme and maybe useful in giving coherence to a large and complex theme.<sup>12</sup> Therefore, from the analysis, two of the themes, which were either particularly large or complex were categorised further into sub-themes. The themes and sub-themes that provided the framework for the analysis and are described below:

1. NHRIs' engagement with refugee and asylum related matters varies widely
2. The socio-political context undermines the extent to which the NHRIs can effectively advance refugee rights. The sub-themes were securitization of asylum, xenophobia and lack of political will to effectively implement refugee laws and policies
3. NHRIs utilise specific working methods to promote and protect refugee rights
4. Capacity constraints negatively impact the extent to which the NHRIs can effectively promote and protect refugee rights
5. Non-prioritisation of refugee rights or invisibility of NHRIs to refugee issues impacts negatively on the NHRIs' effective promotion and protection of refugee rights
6. There are opportunities available to NHRIs to enhance their effectiveness in addressing refugee rights. The sub-themes were improving institutional capacity, increasing their visibility, enhancing their relationship with CSOs and the UNHCR, and utilising regional mechanisms and platforms to enhance promotion and protection of refugee rights.

### **5.7 Ethical considerations**

Ethical considerations relate to standards associated with the research process and respect for the subjects of the research.<sup>13</sup> These are based on four generally accepted ethical principles, which are: *respecting autonomy*-where a person makes an informed decision about

<sup>12</sup> Virginia Braun and Victoria Clarke, "Using Thematic Analysis in Psychology," 22, accessed 25 June 2020, [https://uwe-repository.worktribe.com/preview/1043068/thematic\\_analysis\\_revised\\_-\\_final.pdf](https://uwe-repository.worktribe.com/preview/1043068/thematic_analysis_revised_-_final.pdf).

<sup>13</sup> Elizabeth DePoy and Laura Gitlin, "Research Ethics," in *Introduction to Research: Understanding and Applying Multiple Strategies*, 5<sup>th</sup> Edition, (St Louis: Elsevier Inc., 2016), 24 <https://doi.org/10.1016/B978-0-323-26171-5.00036-7>

participating; *beneficence*- where benefits are maximised and risks are minimised; *non-maleficence*- avoiding bad intention or ‘do no harm’; and *justice*-fairness to research participants both in terms of their selection and their access to research benefits.<sup>14</sup>

While the units of study in this research are NHRIs, human subjects were included as sources of primary data. In particular, the research included interviews with refugees, who are deemed, in the context of research, to be especially vulnerable to harm or exploitation.<sup>15</sup> Consequently, it was necessary that the research process included consideration of pertinent ethical issues, which emanate from the four principles mentioned above. These were voluntary participation, informed consent, no deception to the subjects, ‘do no harm’, anonymity, confidentiality and obtaining ethical approval from the mandated research ethics bodies at the University of Cape Town and in Kenya. These are discussed below.

### 5.7.1 Voluntary participation

Voluntary participation as an ethical consideration requires that participants are not coerced into participating in this study and is a principle derived from the notion of respecting autonomy.<sup>16</sup> All the participants voluntarily agreed to participate in this study. No incentives to induce participation were offered to the participants. All participants confirmed that they

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<sup>14</sup> These are based on fundamental principles drawn from the 1947 Nuremberg Code which were extended and formalised in 1964 by the World Medical Association Declaration of Helsinki (*Helsinki Declaration*) and have been expounded on, for instance, through the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research’s *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (*The Belmont Report*) and the work of Beauchamp and Childress. See The Nuremberg Code: Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law 2, no. 10, 181-182. Washington, D.C.: U.S. Government Printing Office, 1949, accessed 4 November, 2019 <https://history.nih.gov/research/downloads/nuremberg.pdf>;

World Medical Association, *Declaration of Helsinki: Ethical Principles for Medical Research involving Human Subjects*. World Medical Association [adopted 1964; last updated 2013] <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/>; The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Bethesda: The Commission, 1978) [https://videocast.nih.gov/pdf/ohrp\\_appendix\\_belmont\\_report\\_vol\\_2.pdf](https://videocast.nih.gov/pdf/ohrp_appendix_belmont_report_vol_2.pdf) (Accessed 31 October 2019); Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 8<sup>th</sup> Edition, (Oxford: Oxford University Press, 2019). On the concept of justice in research see I Pieper, and C.J.H Thomson, “Justice in Human Research Ethics: A Conceptual and Practical Guide,” *Monash Bioethics Review* 1 31, no. 1 (2013): 99-116.

<sup>15</sup> World Medical Association, *Declaration of Helsinki*.

<sup>16</sup> Paul J. Lavrakas ed. *Encyclopedia of Survey Research Methods*, (Los Angeles: SAGE, 2008) <http://dx.doi.org/10.4135/9781412963947.n629>.



were participating in this study voluntarily before each interview commenced. They were assured that their participation or non-participation would not have consequences with the institutions they worked for or organisations that provided them with services.

### **5.7.2 Informed consent**

Informed consent also derives from the notion of respect for the research participant's autonomy.<sup>17</sup> Written informed consent was obtained from participants [See Appendix 4]. All participants received an email with an information sheet setting out the parameters of this study, the process of the interview and the option to withdraw from participation without consequence. Hardcopies of these were also given to the participants for their review and signature. Before the interview commenced, the researcher also sought permission to record the interviews to avoid excessive note taking. All the participants agreed to the recordings. The participants were also assured that they had the right to terminate the interview and withdraw from this study at any time without any consequences. None of the participants terminated an interview.

### **5.7.3 No deception of the participants**

According to Creswell, deception occurs “when participants understand one purpose but the researcher has a different purpose in mind.”<sup>18</sup> Participants were assured about the purpose of this study. The researcher did not make any promises in tangible changes in policy, practice or direct benefit from participation in this study. The participants were made aware that the research was purely for academic purposes and that the researcher was a doctoral candidate.

### **5.7.4 ‘Do no harm’**

Minimising the risk of harm to participants was taken into account, in particular in the case of the refugees who are deemed a group vulnerable to harm and exploitation. There was no

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<sup>17</sup> See note 16 above.

<sup>18</sup> John H. Creswell, *Research Design: Qualitative, Quantitative and Mixed Method Approaches 4<sup>th</sup> edition*, (Los Angeles: SAGE, 2014), 97.

evident physical risk of participation in this study. Any psychological and social risks were minimised through ensuring anonymity and confidentiality. The questions were formulated to ensure as far as possible that the participants did not feel uncomfortable answering them. Prior to commencing, the researcher identified service providers who could provide psychosocial support should the need have arisen. All interviews were also conducted at the convenience of the participants and in locations where they felt comfortable. None of the participants displayed signs of distress during the interviews. There are no direct benefits for participants in this study. However, the findings would support this study's argument about the need to consider NHRIs' potential role in filling the existing gaps in the promotion and protection of refugee rights.

#### **5.7.5 Anonymity and confidentiality**

Anonymity is the principle that participants will remain anonymous throughout the study and confidentiality entails ensuring that identifying information will not be made available to anyone not directly involved in the study.<sup>19</sup> In terms of assuring anonymity, this study ensured that participants' personal information was not collected in any form. All the participants were assured that the interviews would be anonymised and no personal information would be collected. The data was captured using identifiers to avoid revealing the participants' actual institutional, organisational or refugee community affiliation [See Appendix 8]. The findings were also presented in manner that ensured their individual responses could not be linked back to them. To assure confidentiality, the data collected was stored in password-protected devices and will be destroyed in accordance with the University of Cape Town's (UCT) ethical guidelines in research. In addition, only the researcher and her supervisor have access to the data, which is in the researcher's possession.

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<sup>19</sup> Center for Social Research Methods, *Ethics in Research*, accessed 13 November 2019, <https://socialresearchmethods.net/kb/ethics.php>.

### 5.7.6 Ethical approval to conduct the study

Given that this study involved human participants, ethical approvals from the relevant research ethics committees in South Africa and Kenya were obtained. The UCT Law Faculty's Ethics in Research Committee granted ethical approval for this study on 24<sup>th</sup> April 2018 [See Appendix 1]. Additional research clearance was obtained from the National Commission for Science and Technology (NACOSTI), the research authority in Kenya, on 17<sup>th</sup> October 2018 [See Appendix 2]. In addition, permission was sought from individuals in authority to recruit study participants who were representatives from the NHRIs and the CSOs. Letters explaining the purpose of this study and a request to conduct an interview with a representative were emailed to the relevant institutional or organisational authorities [See Appendix 3].

### 5.8 Limitations of the study

The limitations of a study are those aspects of the research design or methodology that had an impact on the interpretation of the research findings.<sup>20</sup> These are usually beyond the researcher's control but are inherent in the research methodology.<sup>21</sup> The first limitation of this study relates to the sampling procedure. The sample size was small as it was selected using a purposive sampling technique. The use of purposive sampling indicates a bias as the researcher deliberately selects certain units for study from the population.<sup>22</sup> However, it seeks to maximise the range of specific information that can be obtained<sup>23</sup> - in this case, information about national human rights institutions within the context of refugee protection. As a result, only few participants could be recruited to participate in the study, as the selection criteria required one to either be knowledgeable about NHRIs or to have had direct contact with an

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<sup>20</sup> James H. Price and Judy Murnan, "Research Limitations and the Necessity of Reporting Them," *American Journal of Health Education* 35, (2004): 66-67 <https://doi.org/10.1080/19325037.2004.10603611>

<sup>21</sup> Price and Murnan, "Research Limitations and the Necessity of Reporting Them," 66-67.

<sup>22</sup> Vibhute and Aynalem, *Legal Research Methods*, 160.

<sup>23</sup> Babbie and Mouton, *The Practice of Social Research*, 277.

NHRI through its activities or indirectly through a service provider that worked closely with NHRIs.

However, the small sample size is acceptable in this context, as there is no intention on the researcher's part to generalise beyond the sample surveyed. As such, while the interviews generated detailed information about the participants' experiences and perceptions, these cannot be generalised. As Jacobsen & Landau note:

One of the most significant problems of small-scale studies is that while they yield in-depth and valid information, they are seldom representative of the target population about which the researcher wishes to make claims. As such, they do not allow us to make accurate descriptive inferences about the groups in which we are interested.<sup>24</sup>

Therefore, the sample for this study may not be representative and cannot be generalised to all national human rights institutions or to the experiences of all refugees or service providers who have interacted with NHRIs in South Africa and Kenya. This study is exploratory in nature and the research design suited the purpose of creating an argument for the need to increase attention to the role that national human rights institutions can play in filling the existing gaps in the promotion and protection of refugee rights.

The second limitation is that the use of the semi-structured interview schedule required continuous careful consideration to ensure that the interview was not conducted in a rigid manner. This was necessary to allow for spontaneous discussion to occur and sufficient opportunity for probing and clarification. Furthermore, this was needed bearing in mind that the conversational tone and body language may prompt particular responses or that may inadvertently direct answers, or that the responses may be biased. The third limitation was that some participants were asked to provide information on institutions that they worked for. Thus, there was the possibility that they might provide socially desirable responses.

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<sup>24</sup> Karen Jacobsen and Loren B. Landau, "The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration," *Disasters* 27, no. 3 (2003): 194-195.

### 5.9 The positionality of the researcher

According to Rowe, positionality in research is the researcher's positioning in relation to the context of the study.<sup>25</sup> This positioning influences the research processes for instance, how the research is conceptualised, how data is collected or the manner in which the data is interpreted.<sup>26</sup> This researcher had prior work experience with the South African Human Rights Commission and is knowledgeable about NHRIs and the international refugee protection regime. Thus, this study's conceptualisation drew from the researcher's experience with and knowledge of NHRIs and international refugee law. This professional and academic background, to some extent, positioned the researcher to lend credibility and authority to the discussion and interpretation of the findings.

### 5.10 Conclusion

The discussion in this chapter highlighted the research process undertaken to answer this study's questions. This study employed a non-doctrinal approach as the methodological framework and a qualitative research design. A detailed discussion of the research design highlighted the research process, the limitations of this study and ethical considerations addressed. The subsequent data analysis identified six themes that formed the basis of the discussion of the findings. The next two chapters will discuss these findings in-depth and include critical commentary comparing the findings to secondary sources, similar studies or theories examined in previous chapters.

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<sup>25</sup> Wendy E. Rowe, "Positionality" in *The SAGE Encyclopedia of Action Research* edited by David Coghlan and Mary Brydon-Miller, (London: Sage Publications Ltd., 2014): 629 (628-631) DOI: <https://dx.doi.org/10.4135/9781446294406>

<sup>26</sup> Dongxiao Qin, "Positionality," *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, (April, 2016), DOI: 10.1002/9781118663219

## **Chapter 6**

### **NHRIs' Engagement with the Promotion and Protection of Refugee Rights in South Africa**

#### **6.1 Introduction**

This chapter discusses the findings based on thematic analysis of the perceptions about the role that NHRIs in South Africa play in the promotion and protection of refugee rights. The first section discusses the extent to which the NHRIs in South Africa have engaged with the refugee protection regime. This is followed by a discussion on the impact that the context within which NHRIs operate has had an impact on the extent to which the NHRIs have engaged with the promotion and protection of refugee rights. The next section discusses the working methods that NHRIs have utilised to promote and protect refugee rights. A discussion on the impact of capacity constraints has had on the NHRIs' effective engagement with the refugee protection regime then follows. The final section presents the discussion on the opportunities that NHRIs in South Africa have to enhance their engagement with the promotion and protection of the refugee rights. The discussion of each of the six themes follows below.

#### **6.2 The NHRIs' engagement with refugee related matters varies based on the breadth of their mandate**

The findings indicate that the NHRI with the broadest mandate has the highest level of engagement with the promotion and protection of the rights of migrants in general and refugees and asylum seekers in particular. The level of engagement was determined using the following factors: the number of documented activities that the NHRI conducted; and the NHRI that participants reported to have frequently engaged with or that they were knowledgeable about. This finding corresponds to Pegram's conclusion that a broad and unrestrictive human rights mandate is necessary especially in the context of unlawful

detention and where migrants, refugees and asylum seekers face xenophobia.<sup>1</sup> The NHRI's broad mandate implies that it can promote and play an oversight role over a broad spectrum of rights. This has placed the SAHRC at an advantageous position with respect to the promotion and protection of refugee rights. Thus, it is the SAHRC, which has been the most actively engaged with matters related to refugees and asylum seekers or migrants in general. The Gender Commission and the Public Protector have had limited engagement, as indicated from the participants' responses and the desk review.<sup>2</sup> Though there is evidence indicating that the NHRIs interact on occasion where refugee rights are concerned, this is usually during commemorative events such as the annual World Refugee Day.<sup>3</sup> In addition, the participants reported that they have interacted primarily with the SAHRC, to a limited extent with the Gender Commission, but not at all with the Public Protector.

The SAHRC has since its inception, been involved in promoting and protecting refugee rights.<sup>4</sup> Refugee rights were identified as a priority human rights issue and a Commissioner was tasked with overseeing this area of work, as supported by this statement:

As an institution, we have been working on the rights of refugees, as these are fundamental human rights, which the SAHRC is mandated to promote and protect. My office was recently specifically assigned, in 2018, to this portfolio. Previously, this portfolio was managed by Chairperson Majola [the SAHRC Chairperson].<sup>5</sup>

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<sup>1</sup> Thomas Pogram, "National Human Rights Institutions in Latin America: Politics and Institutionalization," in Goodman, Ryan and Thomas Pogram (eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (New York: Cambridge University Press, 2012), 210-240.

<sup>2</sup> A search using the terms "refugee" and "asylum seeker" was done on all the Gender Commission's and the Public Protector's annual and thematic reports available on their websites between 1 March 2017 and 30 April 2019. The results found two references to refugees for the Gender Commission and none for the Public Protector. However, a cautionary note is that not all reports produced by the NHRIs are published on the website, neither are all activities undertaken included in reports that are made public. (See e.g., NANHRI, *Study on the State of NHRIs in Africa*, 2016). For example, the researcher has on file a monitoring report on the situation of displaced refugees prepared by Gender Commission in 2015 and discussed in section 6.5.2. This report was not published on the Gender Commission website.

<sup>3</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>4</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>5</sup> Interview with NHRI participant 1, Johannesburg, South Africa

In accordance with the SAHRC Act, it has also made use of an advisory committee to provide additional technical support on asylum-related matters.<sup>6</sup> The advisory committee, referred to as the Section 11 Committee, forms the basis for establishing working relationships with CSOs and relevant UN agencies working on refugee rights and other migrants.<sup>7</sup> These relationships will be discussed in section 6.7 below.

The SAHRC's broad mandate has allowed it to engage in policy development to the extent that compliance with the Constitution and international human rights norms and standards require this. It has implemented advocacy programmes to address xenophobia, promoted human rights education in schools on the rights of migrants, and held workshops and public discussions on the challenges that undermine the realisation of rights for refugees and asylum seekers.<sup>8</sup> It has also litigated and investigated complaints about violations of refugee rights.<sup>9</sup> These activities are highlighted in chapter four and are discussed in depth in section 6.4 below.

The participants reported they interacted primarily with SAHRC and that they were aware of the SAHRC's involvement with refugee rights. All service provider participants had made referrals of refugee complaints to the SAHRC and one service provider had implemented a programme and litigated on a matter together with the SAHRC [See discussion in section 6.7]. However, none of the service providers reported satisfaction with

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<sup>6</sup> Established under the South African Human Rights Commission Act, Section 11. According to the NHRI participant 1, at the time of the interview in March 2019, the Section 11 Committee on Migration had not yet been re-constituted and its future is pending determination by the current Commissioner overseeing matters related to migration.

<sup>7</sup> Interview with NHRI participant 1, Johannesburg, South Africa; See also HSRC, Assessment of Relationship between CSOs and NHRIs in South Africa, 2007.

<sup>8</sup> SAHRC Annual reports 2012-2018; Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>9</sup> For instance, *Centre for Child Law and 25 others v Minister of Basic Education and 4 others* (with SAHRC as amicus curiae); *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198; 2014 (11) BCLR 1352 (GJ); [2014] 4 All SA 482 (GJ) (28 August 2014); *MT v Refugees Appeal Board and Others*, GP /415/0433; The SAHRC represented an asylum seeker, Hafiz Saddiq, in the Equality Court sitting at the Vereeniging Magistrate's Court. The asylum seeker sought access to his unemployment benefits when his claim was rejected by the Department of Labour because he was an asylum seeker. (*Hafiz Saddiq v Department of Labour*, 4 July 2017); Interview with participant; See also Chapter 4 of this thesis.



the SAHRC's role within the South African refugee protection regime as exemplified by the following responses:

Yeah, I suppose there is some impact. I think a lot of people probably would expect it to be more and I think generally the human rights commission have kind of difficulties with capacities and having their recommendations followed or seen kind of acknowledged you know, so it's not just with refugees where they run into trouble I think they are struggling across the board.<sup>10</sup>

With regard to the Gender Commission, since its participation in the development of the Refugees Act in 1996, its involvement with refugee matters has been ad-hoc. The Gender Commission participant reported that the Gender Commission did not plan to carry out any specific activities related to refugees or asylum seekers:

I do not recall any recent work on refugees and there is currently no plan to do so. I think a report was done after the xenophobic violence erupted in KZN in Chatsworth in 2015, but I will have to check with one of the Commissioners to see if any work will be done in this area in future.<sup>11</sup>

From the findings, only two service providers indicated having interacted with the Gender Commission.<sup>12</sup> These interactions occurred during the observance of Women's Day/Women's month in South Africa, participation in workshops and when a complaint related to access to education for refugee children and children seeking asylum was lodged with the Gender Commission. Both participants reported that the interaction with the Gender Commission was not based on any form of strategic engagement and reflects the Gender Commission's apparent lack of strategic engagement with refugee related matters. The perceptions about the CGE are encapsulated in this statement by a service provider participant: "With CGE? No, there hasn't been a lot of interaction [with CGE] except in general workshops but not in implementation of particular programmes."<sup>13</sup>

<sup>10</sup> Interview with service provider 5, Cape Town, South Africa

<sup>11</sup> Interview with NHRI participant 2, Johannesburg, South Africa

<sup>12</sup> Interview with service provider 1 (Durban, South Africa) and service provider 2 (Johannesburg, South Africa) participants.

<sup>13</sup> Interview with service provider 2 participant, Johannesburg, South Africa

This study also found that the Public Protector's engagement with the promotion and protection of refugee rights has been peripheral and ad hoc. Service providers held a negative view of the Public Protector. They claimed that the Public Protector was not at all interested in asylum matters. They also expressed little confidence in the Public Protector's capacity to influence any positive outcome where rights of refugees, asylum seekers, or migrants in general were concerned as indicated by the statements below:

[Respondent laughing] The Public Protector? No, we have never dealt with them and as far as I know, they do not deal with matters related to refugees and asylum seekers...I would be surprised.<sup>14</sup> (Service provider, Durban)

On occasion, some of our clients do come and have a case opened with the Public Protector, but I don't remember one way or the other if there was any positive conclusion in those cases.<sup>15</sup> (Service provider, Cape Town)

We have collaborated with Chapter Nine institutions [NHRIs] but not the Public Protector due to lack of confidence in the current Public Protector's office.<sup>16</sup> (Service provider 1, Johannesburg)

The findings indicate that the NHRIs in South Africa have significant roles to play in the promotion and protection of refugee rights in accordance with their respective mandates. Their roles, depending on the NHRI, are recognised and acknowledged by the various actors within the refugee protection regime and their mandates allow for robust engagement with asylum-related matters, particularly given the evidence that refugee law and policy lacks effective implementation and often implementation occurs in contravention of the law and court rulings.

However, there is a general perception among service provider and refugee participants that the NHRIs were failing to effectively discharge their mandates. Service provider participants acknowledged that the SAHRC, in particular, was an ally, but they expressed little confidence in its capacity and capability to utilise its powers to bring about change within the refugee protection regime. Refugee participants held similar perceptions to

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<sup>14</sup> Interview with service provider 1, Durban, South Africa.

<sup>15</sup> Interview with service provider 4, Cape Town, South Africa.

<sup>16</sup> Interview with service provider 2, Johannesburg, South Africa.

those of service providers. While they reported awareness of the SAHRC's role, they perceived service providers as more competent and more willing to act on their behalf, as one refugee participant said: "NGOs are filling a gap because the NHRIs aren't doing what they should do."<sup>17</sup>

With respect to the Gender Commission, its mandate affords it the opportunity to address the gendered aspects of asylum, either highlighting these in policy, law or practice or addressing the challenges that arise or may arise during implementation. Two participants referred to gender. One discussed the need to address the rights of sexual minorities, and another the need to pay particular attention to the situation of women and children refugees. These responses flagged an often-excluded aspect of the asylum experience i.e. the requirement to consider gender.<sup>18</sup>

Gender-related aspects of asylum are not limited to considerations of gender-related grounds of persecution, but take into account the asylum experience as a whole, including how rights are accessed and the impact that problems such as gender-based violence has on women, children and sexual minorities.<sup>19</sup> Studies show that sexual minorities, women and children asylum seekers face significant challenges when accessing the asylum system, with many of these challenges continuing for those granted refugee status.<sup>20</sup> Further, that there is a dearth of knowledge about the experiences of these categories of refugees and asylum

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<sup>17</sup> Interview with refugee participant 1, Durban, South Africa

<sup>18</sup> Jane Freedman, "Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?" *International Migration* 48, no. 1, (2010): 175-198, doi:10.1111/j.1468-2435.2009.00549.x.

<sup>19</sup> B Camminga, "Gender Refugees" in South Africa: The "Common-Sense" Paradox," *Africa Spectrum*, 53, no. 1, (2018): 89-112.

<sup>20</sup> Heinrich Boll Stiftung, A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa, Interview with Victor Chikalogwe, PASSOP, 11 October 2018. <https://za.boell.org/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa>, accessed 3 September, 2019; Yellavarne Moodley, "Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights," *Working Paper Series [Paper 5 of 2012]* University of Cape Town: Refugee Rights Unit, accessed 2 September 2019, [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Paper\\_5\\_of\\_2012.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_5_of_2012.pdf); Tal Schreier, *Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the UCT Refugee Rights Unit*, UCT Refugee Rights Unit, (2011); June Middleton, *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa*, 2009, (Unpublished Master's Thesis); A. Bloch "The Right to Rights? Undocumented Migrants from Zimbabwe Living in South Africa." *Sociology* 44, no. 2 (2010): 233-250.

seekers, as research tends to overlook them, findings in reports are reflected in broad strokes or fail to disaggregate data on them.<sup>21</sup>

These issues indicate that the Gender Commission can play an important role within the refugee protection regime, to ensure that challenges based on gender are addressed within the asylum adjudication process and when making rights accessible. In this regard, the application of the principle of intersectionality in the NHRIs' work would be pertinent to ensure a holistic approach in addressing the situation of women, girls and sexual minority refugees and asylum seekers. There is a growing trend among NHRIs to either explicitly or implicitly undertake human rights work by utilising an intersectional approach either in general or specifically with respect to women's rights and other persons with identified vulnerabilities such as those with HIV or in places of detention.<sup>22</sup> However, acknowledging this need does not necessarily mean that the NHRIs have the technical capacity to do so. It would be incumbent upon the NHRIs to recognise this need to enhance their technical capacities, if so lacking, and to utilise a multi-layered approach to addressing human rights issues. Such an approach also lends itself to enhanced collaboration among the NHRIs.

Given the challenges that have been widely and comprehensively documented on the Department of Home Affairs' failings with respect to the implementation of the Refugees Act, the adverse court rulings and its non-compliance with court orders, participants opined that the Public Protector ought to have played a more prominent role within the asylum

<sup>21</sup> Foundation for Human Rights, *Assessment of knowledge, services and gaps regarding refugee and migrant women and children*, 2013.

[https://www.fhr.org.za/files/5713/8504/0322/FHR\\_women\\_children\\_gaps\\_report\\_FINAL\\_130227.pdf](https://www.fhr.org.za/files/5713/8504/0322/FHR_women_children_gaps_report_FINAL_130227.pdf)

<sup>22</sup> GANHRI and APF, "The Role of National Human Rights Institutions in Promoting Gender Equality and the Empowerment of Women and Girls Living in Rural Areas: Report Presented at the 62nd Session of the Commission on the Status of Women (CSW 62), New York, March 2018, 4, accessed 26 June, 2020, [https://nhri.ohchr.org/EN/Themes/WomenRights/Commission%20on%20the%20Status%20of%20Women/GA-NHRI-](https://nhri.ohchr.org/EN/Themes/WomenRights/Commission%20on%20the%20Status%20of%20Women/GA-NHRI-APF%20report%20on%20the%20Role%20of%20NHRIs%20in%20promoting%20gender%20equality%20and%20the%20empowerment%20of%20women%20and%20girls%20in%20rural%20areas.pdf)

[APF%20report%20on%20the%20Role%20of%20NHRIs%20in%20promoting%20gender%20equality%20and%20the%20empowerment%20of%20women%20and%20girls%20in%20rural%20areas.pdf](https://www.fhr.org.za/files/5713/8504/0322/FHR_women_children_gaps_report_FINAL_130227.pdf); ARASA, Africa Regional Grant on HIV and NANHRI, "Promoting and Protecting the Rights of Key Populations: Making Rights a Reality," Second Regional Capacity Strengthening Convening for African Human Rights Institutions: Johannesburg South Africa, 4-7 September 2017, 17

<https://www.arasa.info/media/arasa/Resources/Meeting%20reports/nhri-report-2017-updated-22jan18.pdf> (accessed 26 June 2020).

system. Apart from the information from two interviews, this study identified only citations of the Public Protector's involvement with refugee rights' issues. In 2004, the Public Protector conducted an investigation into the Department of Home Affairs' management of the Johannesburg Refugee Reception Office (RRO).<sup>23</sup> The Public Protector found that the Department of Home Affairs was failing to meet its obligations with respect to refugees and asylum seekers.<sup>24</sup> In 2012, a local CSO partnered with the Public Protector to assess the situation of refugees and non-nationals in South Africa.<sup>25</sup> Despite its involvement, the report of the assessment did not include any recommendations for the Public Protector.<sup>26</sup>

The evidence from this research therefore supports the perception that the Public Protector has played a minimal role in the refugee protection regime. This could be due to poor reporting or publication mechanisms within the institution rather than a complete disengagement with asylum-matters. The findings also indicated that the institution is rarely considered a necessary avenue for remedies when challenges arise. Yet, it has the potential for demanding a high degree of accountability from the Department of Home Affairs and other relevant government structures in light of the Constitutional Court's ruling that determined that its recommendations for remedial action were binding.<sup>27</sup>

Finally, the findings highlight that there is limited collaboration amongst the NHRIs with respect to addressing asylum matters. The findings did not identify any strategic and coordinated level of engagement amongst the three NHRIs on any matters in general. Neither

<sup>23</sup> HRW, *Living on the Margins*; Office of the Public Protector of South Africa, *Report on an investigation*, 3-4

<sup>24</sup> Human Rights Watch, "South Africa: Living on the Margins, 12.

<sup>25</sup> FHR, *Refugee Report: Assessment of the Human Rights Situation of Refugees and Non-nationals July 2011 – April 2012*, accessed 2 August, 2017, [http://www.fhr.org.za/files/1214/0016/1064/REFUGEES\\_AND\\_NON\\_NATIONALS\\_ASSESSMENT\\_2012\\_FINAL\\_REPORT.pdf](http://www.fhr.org.za/files/1214/0016/1064/REFUGEES_AND_NON_NATIONALS_ASSESSMENT_2012_FINAL_REPORT.pdf),

<sup>26</sup> FHR, *Refugee Report*.

<sup>27</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others*; Recent challenges to the Public Protector's findings have resulted in low perceptions of its credibility and effectiveness: *News24*, "The legal argument for removing the Public Protector," accessed 2 September 2019, [https://www.news24.com/Columnists/Serjeant\\_at\\_the\\_Bar/the-legal-argument-for-removing-the-public-protector-20190726](https://www.news24.com/Columnists/Serjeant_at_the_Bar/the-legal-argument-for-removing-the-public-protector-20190726); Jan Gerber, "Parliament asked to Speed up Public Protector Removal after ConCourt Ruling," 22 July, 2019, <https://www.news24.com/SouthAfrica/News/parliament-asked-to-speed-up-public-protector-removal-after-concourt-ruling-20190722>.

was there evidence that refugee rights were addressed concertedly, despite all three NHRIs having implemented at least one key activity dealing with refugee rights promotion or protection. This is a missed opportunity for effective engagement. As discussed above, an intersectional approach to human rights work, would foster critical reflection on the roles that each of the NHRIs play and the opportunities provided by the Forum of Institutions Supporting Democracy to encourage synergies in discharging mandates.<sup>28</sup> This forum was identified as an important mechanism for fostering co-ordination and cooperation among the institutions following a parliamentary review of the chapter nine institutions.<sup>29</sup> While the forum has faced institutional challenges,<sup>30</sup> it can provide an avenue, through which an NHRI can place refugee rights on the agenda of the other institutions. It can also provide a means for the NHRIs to formally engage in collaboration, pool resources, and address crosscutting refugee rights issues. The coordinated approach utilised in developing the domestic refugee protection regime showed that good results could be achieved quickly where various stakeholders have a common goal; and where roles and responsibilities are clearly defined and understood. Critically, in the South African context where conflation of migrants with refugees and asylum seekers features prominently, it is necessary for the NHRIs to delineate this particular group of migrants in their interventions.

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<sup>28</sup> SAHRC, “Forum of Institutions Supporting Democracy in South Africa Unequivocally Condemns Attacks on Foreign Nationals,” Joint Media Statement by the Forum of Institutions Supporting Democracy, Friday, 17 April 2015, *SAHRC*, accessed 26 June 2020, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/319-forum-of-institutions-supporting-democracy-in-south-africa-unequivocally-condemns-attacks-on-foreign-nationals>. The members of the FISC issued a joint statement condemning violence against foreign nationals that broke out in parts of South Africa in 2015. A search of the internet did not yield any other joint statements issued by the FISC on any matter except for a media report requesting their inclusion in the national processes dealing with the COVID-19 pandemic in South Africa. Linda Ensor, “Constitutional bodies want to be included in state’s Covid-19 fight, *BusinessDay*, 17 MAY 2020 <https://www.businesslive.co.za/bd/national/2020-05-17-constitutional-bodies-want-to-be-included-in-states-covid-19-fight/>

<sup>29</sup> Kader Asmal Report, xiii, 140

<sup>30</sup> Portfolio Committee of Justice and Correctional Services, “Duplication in Functions of Institutions Supporting Democracy: Input by the Commission for Gender Equality; South African Human Rights Commission; Public Protector; Public Service Commission,” *PMG*, 19 August 2014, <https://pmg.org.za/committee-meeting/17381/>

### **6.3 The socio-political context undermines the extent to which the NHRIs can effectively advance refugee rights**

The findings indicate that the socio-political context within which the NHRIs operate in South Africa, has limited the extent to which these NHRIs can effectively engage with refugee rights. The particular contextual concerns raised by participants related to the securitisation of asylum, xenophobia and the lack of political will to create an environment conducive to the effective promotion and protection of refugee and asylum seeker rights. Given the finding that the NHRI with the broadest mandate has had the highest level of engagement with the promotion and protection of refugee rights, this discussion will primarily focus on the SAHRC.

This section will discuss how the socio-political context has influenced the SAHRC's engagement with the promotion and protection of the refugee rights. It will illustrate how the three factors identified by the participants have contributed to the extent to which the NHRIs advance refugee rights. These were the securitisation of asylum, xenophobia and the lack of political will. This discussion is based on the understanding that context can either impede or progress the achievement of an institution's goals.<sup>31</sup>

With respect to the securitisation of asylum, the findings confirm that asylum is becoming increasingly securitised and that this posed a challenge to the effective promotion and protection of refugee rights. As one participant summed it up: "what we now have are very security driven approaches to dealing with the refugee question."<sup>32</sup> Van Lennep describes securitisation as "the process whereby political actors turn an issue into a matter of security. Asylum is securitised by the repeated characterisation of refugees as fraudsters,

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<sup>31</sup> David A. Hyman; William E. Kovacic, "Why Who Does What Matters: Governmental Design and Agency Performance," *George Washington Law Review* 82, no. 5 (October 2014): 1446-1516; Anne Schneider and Helen Ingram, "Social Construction of Target Populations: Implications for Politics and Policy," *The American Political Science Review*, 87, no. 2 (Jun., 1993): 334-347.

<sup>32</sup> Interview with service provider participant 5, Nairobi, Kenya.

criminals and terrorists.”<sup>33</sup> The result is a sense of unease, among the population, which is promoted by politicians and is coupled with “blame deflection” that is, it is because of refugees that things are not as they should be.<sup>34</sup> The findings of this study reflect this perspective.

Van Lennep, Ilgit and Klotz, Hammerstadt, and Carciotto and Mavura have found that the South African asylum system is plagued with a myriad of challenges, in part due to the focus on security concerns.<sup>35</sup> Hence, the conclusion that the proposed amendments to the asylum policy are due to a shift in thinking and practice that sees migration as an issue of national security.<sup>36</sup> The SAHRC’s stance echoes these conclusions. The SAHRC acknowledges the securitisation of asylum and has raised concerns about its impact on the realisation of refugee rights.<sup>37</sup> The SAHRC has criticised the securitised nature of changes to immigration policy through the amendments to the Immigration Act, the Refugees Act and proposals for the Green Paper and the White Paper on Immigration.<sup>38</sup>

The securitisation of asylum has not limited the SAHRC’s ability to work on asylum-related matters, but, combined with other factors including those discussed below, has led to increased difficulties in engaging with the Department of Home Affairs.<sup>39</sup> For instance, the Department of Home Affairs’ officials ignore requests for meetings with the SAHRC to

<sup>33</sup> Van Lennep, Tove, *The State of the South African Refugee Protection Regime: Part III – Party Politics*, Dec 05, 2018. Available at: <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-iii-party-politics>, accessed 10 June, 2019; See also B. Buzan, O. Waever, and J. de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998).

<sup>34</sup> Van Lennep, *The State of the South African Refugee Protection Regime*.

<sup>35</sup> See for instance: Asli Ilgit and Audie Klotz, “How Far Does ‘Societal Security’ Travel? Securitization in South African immigration policies,” *Security Dialogue* 45, no. 2 (April 2014): 137-155; LHR, *Migrants Suffer as South Africa’s Refugee System Crumbles*, accessed 10 June, 2019, <https://www.lhr.org.za/news/2012/migrants-suffer-south-africa-s-refugee-system-crumbles>; Anne Hammerstadt, “Securitisation from Below: The Relationship between Immigration and Foreign Policy in South Africa’s Approach to the Zimbabwe Crisis,” *Conflict, Security and Development*, 12(1), March 2012, doi: 10.1080/14678802.2012.667659.

<sup>36</sup> Sergio Carciotto and Mike Mavura, *The Evolution of Migration Policy in Post-Apartheid South Africa: Emerging Themes And New Challenges*, Cape Town: The Scalabrini Institute for Human Mobility in Africa (SIHMA), 2016, 72.

<sup>37</sup> SAHRC, “SA Legislation on migrants takes wrong path,” *SAHRC*, 26 June 2018, <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1416-sa-legislation-on-migrants-takes-wrong-path>,

<sup>38</sup> SAHRC, *SA Legislation on migrants*.

<sup>39</sup> Interview with NHRI participant 1, Johannesburg, South Africa.



discuss challenges within the department and the impact on refugees and asylum seekers' accessing their rights.<sup>40</sup> This has limited the SAHRC's efforts to engage substantively with the Department of Home Affairs to address systemic issues that have contributed to the poor implementation of South Africa's asylum laws and policies. The SAHRC participant attributed these challenges to the department's reluctance to effectively manage asylum in South Africa.<sup>41</sup>

This study also found that xenophobia was identified as a significant contextual factor that impacts on the SAHRC's activities related to refugee rights. Huysmans, Ibrahim, Hammerstad, Ilgit and Klotz conclude that there is an association between securitisation of asylum and xenophobia.<sup>42</sup> The securitisation of asylum and high levels of xenophobic discourse in South Africa reflect this association. As discussed in chapter 4, section 4.4.2, studies have found that xenophobia in South Africa is systemic and an integral part of the asylum [and migration] experience.<sup>43</sup> In fact, the Department of Home Affairs is often described as a department that is institutionally xenophobic as reflected in its policies, directives and official's attitudes towards migrants.<sup>44</sup> Further, Bouyat and Demeestre found that the department is promoting the institutionalisation of xenophobia in other public

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<sup>40</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>41</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>42</sup> For example: Jef Huysmans, "The European Union and the Securitization of Migration," *Journal of Common Market Studies* 38, no. 5 (December 2000): 751-778; Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse," *International Migration*, 3, no. 5 (November 2005): 163-187 <https://doi-org.ezproxy.uct.ac.za/10.1111/j.1468-2435.2005.00345.x>, accessed 23 November, 2019; Anne Hammerstad, "Securitization from below," Asli Ilgit and Audie Klotz, "How far does 'societal security' travel?"

<sup>43</sup> For example: Loren Landau, "Tragedy Or Farce? Xenophobic Violence Against Foreign Nationals And Other "Outsiders" In Post- Apartheid South Africa, *ACMS Issue Brief*, (March 2016); Jonathan Crush, "South Africa: Policy in the Face of Xenophobia," *Migration Policy Institute*, (July 28, 2008), accessed May 10, 2017, <http://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia>; Jonathan Crush and Godfrey Tawodzera, "Medical Xenophobia Zimbabwean Migrant Access to Public Health Services in South Africa," *Journal of Ethnic and Migration Studies* 40, no. 4 (April 2014). doi: [10.1080/1369183X.2013.830504](https://doi.org/10.1080/1369183X.2013.830504).

<sup>44</sup> Roni Amit and Norma Kriger, "Making migrants 'il-legible': The Policies and Practices of documentation in Post-apartheid South Africa in *Kronos*, 40 n.1 Cape Town Nov. 2014, accessed 12 May 2018, [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0259-01902014000100012](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-01902014000100012); see also LHR report; Roni Amit, *Queue Here for Corruption*; Loren Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy," *Journal of Refugee Studies* 19, no. 3 (September 2006): 308-327, <https://doi.org/10.1093/jrs/fel012>.

institutions such as schools, police stations and public health care facilities as a direct result of compliance by officials within these institutions with its policies and directives.<sup>45</sup>

This assertion is reflected in the nature of complaints that the SAHRC receives from refugees or asylum seekers. The SAHRC reports indicate that the majority of complaints it receives from migrants, including refugees and asylum seekers, relate to discrimination based on ethnic or social origin.<sup>46</sup> The reported instances of discrimination primarily occur when accessing the rights to documentation, health, education, and employment and when dealing with the police.<sup>47</sup> Though this study found evidence indicating that the Gender Commission and the Public Protector handled complaints from refugees and asylum seekers, it could not determine if the grounds for such complaints was discrimination based on the complainants' status as either refugees or as asylum seekers.<sup>48</sup>

Other NHRI activities have also been undertaken as a direct result of widespread violence targeting migrants or in efforts to address the impact of xenophobia on the rights of migrants in general. For instance, the SAHRC has held several national public hearings on xenophobia and social cohesion. It also subpoenaed Department of Home Affairs' officials in 2019 to demand action to address the delays in adjudication of asylum applications and the resultant backlog. The SAHRC cited the department's unwillingness to engage on asylum matters as the reason for the subpoena. In the hearing that ensued, the view of one stakeholder was that the challenges arose as a direct result of the Department of Home

<sup>45</sup> Jeanne Bouyat and Rodolphe Demeestre found that institutionalisation of xenophobia is particularly high in public high schools and police stations and is as a direct result of compliance by officials within these institutions with the Department of Home Affairs' policies and directives. See Jeanne Bouyat and Rodolphe Demeestre, *The Institutionalization of Xenophobia in the contemporary South African State Officials' practices towards African Immigration in high schools of Johannesburg and police stations of Cape Town*, Seminar presentation, 12 June 2016, Paris France, accessed 20 November 2019.

<http://www.ifas.org.za/research/2016/the-institutionalization-of-xenophobia-in-the-contemporary-south-african-state/>

<sup>46</sup> SAHRC, *Trends Analysis Report 2016/2017*.

<https://www.sahrc.org.za/home/21/files/SAHRC%20Trend%20Analysis%202016%20-%202017.pdf>

<sup>47</sup> *South African Human Rights Commission and 40 Others v Minister of Home Affairs: Naledi Pandor and 4 Others*; SAHRC: *Children illegally detained under Bosasa's watch at Lindela as healthcare crumbles*, 13 Dec 2017; SAHRC: *Equality Court ruling protecting rights of asylum seeker [to unemployment benefits]*, 5 July 2017; SAHRC *Investigative Report - MT v RAB GP 1415 0433*.

<sup>48</sup> Commission for Gender Equality, *Annual Report 2015*; FHR, *Refugee Report*.

Affairs being xenophobic and unwilling to adhere to the prescripts of the Refugee Act to ensure an effectively run asylum system.<sup>49</sup> The Gender Commission played a role in assessing the compliance of the displacement camps that housed refugees and asylum seekers, with international standards following an outbreak of xenophobic violence in Durban, South Africa in 2015.

Broadly speaking, the activities mentioned above can be classified into two groups, either provision of services (complaints handling and referrals) or advocacy for social-change, to enhance integration or better policy implementation for systemic and structural change. Resources allowing, the interventions at service provision level would perhaps be easier, given that resolution of a matter is usually at an individual case-by-case level. The challenges, as noted by Pugh, arise when “advocating for what is arguably a socially and politically unpopular population within a national discourse and climate that largely positions migrants, refugees and asylum seekers as a threat or zero-sum competition to the economic and social well-being of other...citizens.”<sup>50</sup>

Furthermore, discussions with participants on how xenophobia impeded NHRIs’ capacity and capability to effectively address refugee rights revealed a perception that xenophobic attitudes were deeply embedded among policy-makers, politicians and civil servants. As stated by one participant: “We keep hearing “how can we deal with foreigners when we are struggling to provide for our own people?”<sup>51</sup> There was also the perception that the NHRIs faced significant social and political pressure to clearly prioritise the needs of citizens over those of migrants as encapsulated in responses such as: “We’ve often heard that South Africans face many challenges, how then can the Commission, CGE [Gender

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<sup>49</sup> The DailyVox Team, ADF: Home Affairs Comments on Asylum Seekers are Xenophobic, *The DailyVox*, February 13, 2018, <https://www.thedailyvox.co.za/home-affairs-comments-on-asylum-seekers-xenophobic/>

<sup>50</sup> Sarah A. Pugh, “Advocacy in the Time of Xenophobia: Civil Society, the State, and the Politics of Migration in South Africa,” *Politikon*, 2014, 41:2, 231, doi:10.1080/02589346.2014.905255.

<sup>51</sup> Interview with refugee participant 3, Durban, South Africa.

Commission] or Public Protector think about us?”<sup>52</sup> These perceptions correspond to studies, which have found the prevalence of this view in South Africa.<sup>53</sup>

Such views support the hierarchical facilitation of access to rights and limited resources, thereby prioritising the needs of South Africans first regardless of the constitutional obligation to ensure rights of all people in the country.<sup>54</sup> The SAHRC reiterated that despite the challenges discussed above, the Constitutional requirement to promote and protect the rights of all people could not be deviated from, and “we are mandated to promote and protect rights of all migrants including refugees and asylum seekers.”<sup>55</sup>

The third factor perceived to have an impact on NHRIs’ effectiveness was the lack of political will to promote the effective implementation of the domestic refugee protection regime. The manifestation of the lack of political will was two-fold. For NHRIs, the State as the primary actor in the refugee protection regime was reluctant to engage effectively with refugee matters. However, service providers and refugee participants perceived both the State and the NHRIs as lacking the political will to engage effectively with refugee matters.

In order to understand the impact of political will on policy implementation and the resulting impact on NHRIs’ role, it is important to first ascribe meaning to the notion of political will. Available literature suggests various definitions and conceptualisations of the term “political will”.<sup>56</sup> While no singular definition or understanding of the term is proffered, there is convergence in the suggestions of the key elements that must be present when discussing political will. These are “willingness”, “capacity”, “authority” and “reform”.<sup>57</sup> Therefore, the presence or absence of political will rests on the willingness of an actor or

<sup>52</sup> Interview with service provider participant 2, Johannesburg, South Africa.

<sup>53</sup> Sarah Pugh, “Advocacy in the Time of Xenophobia,” 231-232.

<sup>54</sup> Sarah Pugh, “Advocacy in the Time of Xenophobia,” 235-237

<sup>55</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>56</sup> Lori Ann Post, “Defining Political Will,” *Politics & Policy*, 38, no. 4 (2010): 657-659. <https://onlinelibrary-wiley-com.ezproxy.uct.ac.za/doi/epdf/10.1111/j.1747-1346.2010.00253.x>; Jeff Crisp, *Mobilizing Political Will for Refugee Protection and Solutions: A Framework for Analysis and Action 2018*, accessed 27 August, 2019 <https://www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.1web.pdf>.)

<sup>57</sup> Post et al, “Defining Political Will,” 654-659; David Roberts, “What is Political Will anyway?” *Vox*, <https://www.vox.com/2016/2/17/11030876/political-will-definition> .

actors who has/have the capacity and authority, to bring about change or reform.<sup>58</sup> Based on this definition, it would be appropriate to attribute the presence or absence of political will to engage effectively with the implementation of the refugee protection regime, to both the State and the NHRIs.

In the case of States, they have the authority and must be willing to put in place proper structures and resources (capacity) to cause change. Similarly, NHRIs have the authority (constitutional and legislative mandate) and must be willing to utilise the resources at their disposal to influence change. A cautionary note here is that actors can also display a willingness to bring about change but not commit themselves to actually invest resources to bring about the required change, thereby creating an illusion of there being political will.<sup>59</sup> Another important aspect of political will, which Post *et al* point out, is that it is dynamic and is influenced by context.<sup>60</sup> This means that States and other actors respond to their local constituencies and the implementation of refugee policy is no exception to this, as has been discussed above. The sections below will discuss this study's findings on the impact that political will has had on the status of the refugee protection regime, and perceptions that exist of the role that NHRIs need to play to address the resultant challenges.

Considering the key elements of political will, this study found that with respect to “reform” there was consensus among all the participants that change required the effective implementation of the domestic refugee protection regime. This corroborates previous studies on South Africa [and Kenya], which have drawn similar conclusions about the need to reform the implementation of refugee policies in South Africa [and in Kenya].<sup>61</sup> However, reform rests on the willingness and the capacity of an actor to authoritatively advocate for change,

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<sup>58</sup> Post, Raile and Raile, “Defining Political Will,” 657-659.

<sup>59</sup> Post, Raile and Raile, 657-659.

<sup>60</sup> Post, Raile and Raile, “Defining Political Will,” 657-659.

<sup>61</sup> See discussion in Chapter 4 in this thesis.

and to do so successfully, requires a favourable environment.<sup>62</sup> Therefore, it is important to look at these elements and how they affect NHRIs' engagement with the refugee regime in South Africa.

In terms of capacity, one of the NHRI participants stated that the government had deliberately undermined the refugee regime by under-resourcing the government units tasked with refugee management. For example, as mentioned above, the Department of Home Affairs has had a backlog of asylum applications and appeals for over fifteen years.<sup>63</sup> The often-cited reason for the backlog is the lack of capacity.<sup>64</sup> Despite the department implementing several interventions in the past fifteen years to address this, the backlog problem remains.<sup>65</sup> This exemplifies the notion of the illusion of political will. The SAHRC intervened and demanded that the Department of Home Affairs implement an action plan to address the asylum backlog.<sup>66</sup> This action stemmed from a complaint the SAHRC received from an asylum seeker whose asylum application took ten years to be adjudicated.<sup>67</sup>

Service provider participants concurred that the South African government did not appear particularly interested in addressing capacity concerns. One participant described the state of affairs as follows: "The closure of the refugee reception offices (RRO) has been a nightmare for many refugees and asylum seekers who need to access documentation. Despite

<sup>62</sup> Hyman and Kovacic, "Why Who Does What Matters," 1446-1516.

<sup>63</sup> UNHCR, *UNHCR Global Appeal, 2005: South Africa*, (Geneva: UNHCR, 2004): 190-193. <https://www.unhcr.org/41ab28e88.pdf>.

<sup>64</sup> UNHCR, *UNHCR Global Appeal, 2005*, 191; In *Tafira and six Others v Ngozwane & 5 others*, the Court found it 'incomprehensible' that the Department of Home Affairs had not hired sufficient staff to deal with the large numbers of asylum applications.

<sup>65</sup> Minister of Home Affairs in a Q&A session in Parliament stated: "The Department of Home Affairs (DHA) has undertaken two backlog projects in 2001 and 2006 with a view of reducing the backlog. While these projects were able to resolve most outstanding claims, they were not able to prevent the re-occurrence of the Backlog. The problem is complex and as a result of many interlinked causes." Source: Parliamentary Monitoring Group (PMG), *Questions to the Minister of Home Affairs*, March 9, 2017 <https://pmg.org.za/committee-question/4690/>; Zoe Postman, "Home Affairs asks UN for Help with Refugee backlog," *News24*, 17, May 2019 <https://m.news24.com/SouthAfrica/News/home-affairs-asks-un-for-help-with-refugee-backlog-20190516>

<sup>66</sup> Interview with NHRI participant 1, Johannesburg, South Africa; SAHRC, "Media Advisory: The Acting Director-General of the Department of Home Affairs Subpoenaed to Appear before the South African Human Rights Commission on Thursday," SAHRC, 16 May 2019, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1911-media-advisory-the-acting-director-general-of-the-department-of-home-affairs-subpoenaed-to-appear-before-the-south-african-human-rights-commission-on-thursday-16-may-2019>,

<sup>67</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

court rulings ordering the DHA to reopen the RROs, the DHA refuses to comply saying that they do not have the resources to handle asylum applications.”<sup>68</sup> Another participant stated:

...DHA are dead set on their approach so you are not going to really have that much of an impact. They are already kind of set in stone there, on their path forward. So for example, they released their Green Paper on International Migration for public comments and they had a whole bunch of controversial, restrictive policies in it, and then while the Green Paper is still out for public consultation, they release a Refugees Amendment Bill in draft form, which has all the proposals in the Green Paper already. So, I mean they’ve clearly made up their minds and whether the Scalabrini Centre, the Cape Law Society or the Human Rights Commission tells them, one way or the other I don’t think that really matters. You can have some small impact here or there on legislation but the path is set.<sup>69</sup>

There was also consensus among participants that the political will to engage with refugee matters was heavily influenced by the local populations’ attitudes towards African migrants in general, refugee and asylum seekers, or specific groups of refugees and asylum seekers. In this study, this is manifested in the form of xenophobia, as discussed above.

On the notion of “authority”, the findings show that the perception of “who” the actor responsible for the reform was, differed among the participants. For NHRIs, the primary actor was the State, whereas service providers, refugees, and asylum seekers identified both the State and the NHRIs as having primary roles in reforming the refugee protection regime. Thus, service providers and refugees felt that the NHRIs had not displayed sufficient willingness to advocate for change to improve the implementation of refugee law and policies and the asylum experience for refugees and asylum seekers. As one participant stated: “If they showed interest in refugee matters as Chapter Nines [this refers to NHRIs] they would make a difference, they have the powers. For example Thuli Madonsela [former Public Protector] raised the profile of the Public Protector and showed how effective it could be when a Chapter Nine used its powers to deal with matters within its mandate.”<sup>70</sup>

<sup>68</sup> Interview with service provider participant 4. Cape Town, South Africa.

<sup>69</sup> Interview with service provider participant 4, Cape Town, South Africa.

<sup>70</sup> Interview with service provider participant 6, Durban, South Africa.

In addition, service provider and refugee participants felt that the State [DHA] was unwilling to engage with refugee-related matters to such an extent that it had negated its responsibilities towards refugees and asylum seekers. This stance was perceived to have had a detrimental effect on the NHRIs' abilities to engage meaningfully with the promotion and protection of refugee rights. As one participant lamented: "...to the extent that that submission [SAHRC submission on the White Paper on Immigration] is going to have some tangible impact, I wouldn't hold my breath."<sup>71</sup>

The NHRI participant's views were consistent with those held by the service provider and refugee participants. The participant reported that the State's unwillingness to engage effectively with the promotion and protection of refugee rights impeded their own efforts. The participant expressed particular frustration with the difficulties faced in securing audience with Department of Home Affairs officials to discuss any matters related to asylum. For example, during a media briefing, the SAHRC Chairperson stated that the Commission had attempted to engage with Home Affairs for a year to no avail.<sup>72</sup> This was reiterated by the NHRI participant who indicated that the institutions could not handle individual complaints reported by refugees and asylum seekers effectively, as the Department did not respond to either its requests for information on the complaints concerned or requests for meetings to discuss the complaints.<sup>73</sup>

Contrary to the views held by the service provider and refugee participants, the NHRI participant felt that the institution had the political will to engage with refugee matters but that the environment it operated in impeded its efforts. Such impediments were not necessarily obvious to other actors and may have given the impression that there was institutional reluctance to deal with the promotion and protection of refugee rights. The service provider and refugee participants' views perhaps also reflect the high expectations

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<sup>71</sup> Interview with service provider participant 4, Cape Town, South Africa.

<sup>72</sup> SAHRC, "Media Advisory: The Acting Director-General."

<sup>73</sup> Interview with NHRI participant 1, Johannesburg, South Africa.



placed on NHRIs to address all manner of human rights violations, within relatively short periods of time, without due regard to the constraints they may face.<sup>74</sup>

Renshaw and Fitzpatrick suggest that where high expectations are not met, NHRIs may become marginalised from the wider human rights community.<sup>75</sup> This is reflected in the South African context where the service providers and refugees do not often engage with the SAHRC even on crucial matters. For example, a service provider who had lodged a complaint with SAHRC following the Department of Home Affairs' refusal to process asylum applications from applicants lacking adequate documentation, stated:

We approached the SAHRC when the DHA [Department of Home Affairs] refused to accept asylum applications from new arrivals who could not produce their passports. Then we realised that the SAHRC has challenges. It has internal issues. There are things that they can do and others that they can't do. We dropped them along the way and approached LHR [Lawyers for Human Rights] who have since taken up the matter.<sup>76</sup>

The findings also demonstrate that there is a perceived association between the lack of political will and the poor implementation of refugee law and policies. South Africa has domesticated international and regional refugee law in the form of the Refugees Act. Therefore, in theory, refugees and asylum seekers are protected in accordance with international norms and standards. However, participants reported dereliction of duty by the government precisely because of the lack of political will to ensure the promotion and protection of the rights of refugees and asylum seekers. This finding is consistent with research within the public policy discourse, which has established the causal link between political will and policy implementation.<sup>77</sup> As such, one of the factors necessary for effective

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<sup>74</sup> Francesca Jessup and Koffi Kounte, *Final Report: Evaluation of OHCHR Support to National Human Rights Institutions*, (Geneva: OHCHR, 2015) para 11.

<sup>75</sup> Catherine Renshaw and Kieren Fitzpatrick, "National Human Rights Institutions in the Asia Pacific Region: Change Agents under Conditions of Uncertainty," in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institution*, eds. Ryan Goodman and Tom Pegram (New York: Cambridge University Press), 150-180.

<sup>76</sup> Interview with service provider participant 1, Durban, South Africa.

<sup>77</sup> For example: Post, Raile & Raile, "Defining Political Will"; David Roberts, "What is 'political will,' anyway? Scholars take a Whack at Defining It," accessed 27 August, 2019, <https://www.vox.com/2016/2/17/11030876/political-will-definition>; Chukwuka Onyekwena and Mma Amara

policy implementation is the presence of political will. For refugees and asylum seekers, implementation of laws and policies may make the difference between protection and *refoulement* and the resultant danger to life.

The findings reflect consensus among all participants that the government was not adhering to the laws, policies, and regulations governing the protection of refugees and asylum seekers. The implementation challenges that the Department of Home Affairs face have been widely documented.<sup>78</sup> Based on the complaints it had handled, the SAHRC reports indicate that implementation challenges primarily related to administrative action involving documentation and appeals against rejected asylum applications; access to basic services particularly health services and education; and arbitrary arrest and unlawful detention.<sup>79</sup> These matters all stemmed from the Department of Home Affairs' implementation of asylum related policies contrary to the Refugee Act, the Immigration Act and the Constitution, or in a manner that would result in the poor implementation of these laws and policies, for instance, the Department of Home Affairs' reluctance to provide the requisite resources to effectively discharge its mandate.<sup>80</sup>

These findings reflect similar conclusions from studies on the refugee status determination process in South Africa and relevant court decisions.<sup>81</sup> The SAHRC has

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Ekerucheb, "Building political will for policy change: the role of CSOs in Nigeria," 27 May 2019, accessed 27 August, 2019, <https://onthinktanks.org/articles/building-political-will-for-policy-change-the-role-of-csos-in-nigeria/>.

<sup>78</sup> See discussion in Chapter 4 in this thesis.

<sup>79</sup> Interview with NHRI participant 1, Johannesburg, South Africa; See *South African Human Rights Commission v Minister of Home Affairs* and *MT v Refugee Appeal Board*.

<sup>80</sup> Interview with NHRI participant 1, Johannesburg, South Africa. In *Tafira & 6 Others v Ngzwane & 5 Others* the judge, referring to capacity challenges in the DHA's refugee reception offices, stated: Having regard to the duties of a refugee reception officer it is clear that such a person need not be highly qualified and the department should have no difficulty in deploying other officials to such offices or to make new appointments. The number of new officials, which would be required to prevent a backlog, is very low, and considering the tremendous prejudice to asylum seekers, which would be prevented by making available a sufficient number of officials, it is incomprehensible why the department has not yet appointed more officials, 24 *Tafira and six others v Ngozwane & 5 others*. Unreported, High Court of South Africa, Transvaal Provincial Division. Case No. 12960/06, 24

<sup>81</sup> Roni Amit and Norma Kriger, "Making migrants 'il-legible'"; see also LHR report; Amit, Roni, *Queue Here for Corruption*; Loren Landau, "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban

resorted to litigation to force the Department's compliance with the provisions of law.<sup>82</sup>

However, the Department has consistently ignored court rulings leaving the proper implementation of asylum-related laws and policies in abeyance.<sup>83</sup> The SAHRC has, as a result, found that quite often, it is unable to ensure redress where refugee and asylum seeker rights have been violated.<sup>84</sup> Service provider and refugee participants concurred that the Department of Home Affairs implemented laws and policies poorly and that it was reluctant to engage meaningfully with other stakeholders to improve implementation, as reflected in these statements:

DHA are dead set on their approach so you are not going to really have that much of an impact.<sup>85</sup>

This issue: that you have policies, then you have regulations, then you have directives. You find that at the ground here, the directives that are issued by the DG [Director General] or the Deputy DG in charge of refugees are in clear violation of the law. This issue of passports [asylum seekers being required to produce passports before DHA can accept an application for asylum] is neither here nor there, it's not mentioned anywhere but apparently these are directives from the DG...<sup>86</sup>

It's been a very tough journey. I finally got my status, but it was a nightmare going to Home Affairs. I'm lucky that it took me 10 years to get my papers. I have a friend who came here before me but he's still waiting to get help.<sup>87</sup>

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Refugee Policy," *Journal of Refugee Studies* 19, no.3 (September 2006): 308–327, <https://doi.org/10.1093/jrs/fe1012>.

See *Tafira and six others v Ngozwane & 5 others*: the Court declared that the procedures adopted by the DHA's Rosettenville and Marabastad Refugee Reception Offices unlawful; see also *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) where the Court found the DHA's procedures with respect to setting a limit to the number of asylum seekers and refugees it could serve per day unconstitutional.

<sup>82</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>83</sup> Interview with NHRI participant 1, Johannesburg, South Africa. Sarah Pugh, Theresa Alfaro-Velcamp and Mark Shaw, "Please GO HOME and BUILD Africa': Criminalising Immigrants in South Africa," *Journal of Southern African Studies*, 42, 5 (2016): 983–998, doi: [10.1080/03057070.2016.1211805](https://doi.org/10.1080/03057070.2016.1211805); See also Leigh Hamilton, "How Home Affairs has been Ignoring 2 Court Orders, Putting Asylum Seekers at Risk," *News24*, 4 April 2018, <https://www.news24.com/Columnists/GuestColumn/how-home-affairs-has-been-ignoring-2-court-orders-putting-asylum-seekers-at-risk-20180404>. The DHA has been the subject of litigation on numerous occasions due to its poor implementation of asylum-related laws and it operates in breach of a number of court orders.

<sup>84</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>85</sup> Interview with service provider participant 4, Cape Town, South Africa

<sup>86</sup> Interview with service provider participant 6, Durban, South Africa

<sup>87</sup> Interview with refugee participant 3, Durban, South Africa

## **6.4 NHRIs utilise the working methods available through their legislative mandates to promote and protect refugee rights**

The findings indicate that the NHRIs utilise the working methods available through their legislative mandates to advance refugee rights, despite the absence of an express requirement within their mandates to either promote or protect these rights. All the NHRIs in South Africa surveyed for this study, have both promotion and protection mandates. The findings showed that the extent to which they engaged with matters related to refugees varied greatly, and in some cases was non-existent.

As discussed in section 6.2, the findings confirm that the SAHRC has the highest degree of engagement with matters related to migrants broadly and specifically those that related to refugees and asylum seekers. This section will first discuss the SAHRC's promotional activities and then the protection activities undertaken to advance refugee rights. Reference will also be made to the activities of the other NHRIs where the findings indicate engagement with the promotion and protection of refugee rights.

### **6.4.1 NHRI Promotional activities**

In their study on the safeguards for NHRI effectiveness, Linos and Pegram assert the importance of NHRIs being vested with promotional functions.<sup>88</sup> The Paris Principles also lay particular emphasis on NHRIs' having promotional responsibilities and suggest the type of activities that this function should entail. These include giving advice to government or other actors, examining and making recommendations on legislation and policies, preparing reports on the domestic state of human rights, promoting compliance with international

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<sup>88</sup> Katerina Linos and Tom Pegram, "What works in human rights institutions?" *American Journal of International Law* 111, no. 3 (July 2017): 628-688. <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/what-works-in-human-rights-institutions/C24517FEA634993D5AB4488B19E42746/core-reader#>.

human rights norms, standards and obligations, cooperating with international and regional bodies and conducting training, education and research.<sup>89</sup>

Consequently, NHRIs' promotional activities are primarily concerned with human rights education and awareness. These activities are important as they enable the dissemination of information and knowledge about human rights to the public and to specific target groups thereby promoting a human rights culture.<sup>90</sup> The specific activities that can be implemented to achieve the promotional objective can be classified into four broad categories, that is, advisory; reporting; human rights education and awareness-raising.

Where advisory activities are concerned, the Paris Principles recommend that NHRIs advise the government and related structures on any human rights matters including compliance of legislation, policies, bills, guidelines etc. with fundamental human rights principles.<sup>91</sup> This includes advising on the harmonisation of legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.<sup>92</sup> In addition, NHRIs are required to contribute to State reports to international and regional mechanisms, and to submit independent reports to these entities.

Within this function, NHRIs will review existing and proposed laws, policies and practices and where necessary, recommend changes or the adoption of new measures to ensure compliance with human rights norms and standards. This function helps in promoting human rights mainstreaming, thereby encouraging compliance with international human rights norms and standards. The advisory role is usually done through the submission of advisory opinions.

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<sup>89</sup> UN, Paris Principles... Part A (3).

<sup>90</sup> OHCHR, *National Human Rights Institutions*, 57; See also Valentin Aichele, "National Human Rights Institutions," in *The SAGE Handbook of Human Rights: Two Volume Set Vol 2*, eds., Anja Mihr and Mark Gibney (London: SAGE Publications, 2014), 691-708.

<sup>91</sup> UN, *Paris Principles: Competences and Responsibilities*. Section 3 (a)-(g)

<sup>92</sup> UN, *Paris Principles*, 3(a) (i), (b)-(d).

A review of African NHRI mandates, found that majority have the powers to perform the advisory role but that they face challenges when performing this role.<sup>93</sup> The factors that were determined to impede these NHRIs' capacity to undertake this role effectively included: the lack of strategies to ensure adoption of recommendations; low levels of interaction with relevant portfolio committees; and lack of technical capacity in terms of staff and expertise to undertake research and policy development as well as to develop convincing advisory opinions based on law and evidence.<sup>94</sup>

This study has found that the SAHRC and, to a lesser extent the Gender Commission, perform this function with respect to the promotion of refugee rights. The SAHRC regularly reviews laws, policies, and guidelines to encourage the development and implementation in compliance with the Constitution and international and regional human rights norms and standards. The SAHRC has a unit, the Parliamentary and International Affairs Unit, within the Research Programme, with the sole mandate to ensure that the SAHRC fulfils this aspect of its mandate. Its tasks are: legislative analysis and drafting of submissions; analysis of South Africa's compliance with its international and regional human rights obligations; drafting NHRI reports to international and regional human rights bodies; and providing advice and opinions on cases, findings, court judgements etc. from a legislative and international perspective.<sup>95</sup>

Thus, the SAHRC has made submissions on bills, regulations and policies related to refugee rights including: Refugee Amendment Bills (2017, 2007), Hate Crimes & Hate Speech Bill (2017), Trafficking in Persons Bills (2006 and 2004), Immigration Act Regulations (2003), Immigration Bill (2000) and the White Paper on International Migration

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<sup>93</sup> NANHRI, *NANHRI Member Profiles*, 2014; NANHRI, *Study on the State of African NHRIs*, 61-62.

<sup>94</sup> NANHRI, *Study on the State of African NHRIs*, 61-62.

<sup>95</sup> SAHRC, "Parliamentary and International Affairs Unit." *SAHRC*, accessed 9 June 2019. <https://www.sahrc.org.za/index.php/what-we-do/programmes>,

(2000).<sup>96</sup> On occasion, the SAHRC has appeared before Parliament at the request of a portfolio committee to discuss their submissions and to propose recommendations to address challenges which migrants, refugees and asylum seekers face, such as xenophobia.<sup>97</sup>

A participant expressed confidence in the SAHRC's institutional structures to adequately support its advisory role.<sup>98</sup> What it lacked was the development of an institutional monitoring and evaluation strategy to determine its impact, and the effectiveness of its role in the development of laws and policies that comply with international and regional refugee law, norms and standards.<sup>99</sup> An important factor here is that the SAHRC lacks the power to enforce its recommendations and, in the absence of a monitoring and evaluation strategy, relies heavily on the government's goodwill for implementation of recommendations.<sup>100</sup> Having such a strategy in place is crucial in light of the views held by participants regarding the SAHRC's capacity to influence implementation of policies, to ensure effective promotion and protection of refugee rights. As one participant stated:

Before we can even talk about [the SAHRC's impact on the] implementation of policy, there's a huge policy shift as far as migrants and immigration is concerned. Our view is that the amended Refugee Act has clauses that are in violation of the Constitution and certainly the 1951 Refugee Convention that South Africa signed without reservation. We would have expected the SAHRC to engage internally with DHA [Department of Home Affairs] and government to challenge those unacceptable provisions.<sup>101</sup>

Another challenge that impacts on its effectiveness is the context within which it operates in, as discussed in section 6.3 above. Participants cited the DHA's reluctance to engage

<sup>96</sup> E.g. SAHRC, *Annual Report 2018*; SAHRC, "Submissions on Legislation,"

<https://www.sahrc.org.za/index.php/sahrc-publications/submission-on-legislation>.

<sup>97</sup> PMG, *South African Human Rights Commission on challenges around submission of National Human Rights Reports to International Organisations & Possible Role of Parliament in this, 14 September, 2010*, accessed 4 June, 2019, <https://pmg.org.za/committee-meeting/12053/>. The SAHRC presentation focused on xenophobia and South Africa's obligation to address it.

<sup>98</sup> Interview with participant.

<sup>99</sup> NANHRI, *Study of the State African NHRIs*, 2016; See also SAHRC, *Annual Report 2017/2018* wherein it notes the need to develop a strategy for follow up on recommendations made to government and other bodies,

<sup>100</sup> e.g. Corkery notes NHRIs' lack of enforcement powers in discussion on NHRIs role in implementation of recommendations with respect to MDGS, Allison Corkery, "National Human Rights Institutions," in *Ways and Means of Realizing Social and Economic Rights and Achieving the MDGs* (New York: CESR, 2011), 152, <http://www.cesr.org/sites/default/files/WaysAndMeanscorkerychapter.pdf>.

<sup>101</sup> Interview with participant.



meaningfully with stakeholders where immigration and asylum policies were concerned, as one of the most significant challenges.

The second category of promotional activities is that of reporting. Reporting is the presentation of human rights information that the NHRIs have gathered during the course of conducting their activities. This information could be gathered from the NHRI's own research, from its investigative activities, international and regional bodies, or even the courts. This information is usually disseminated in the form of annual, thematic or regular reports either highlighting its own activities or the state of human rights in the country. Depending on the nature of the report, the NHRI may also recommend measures for redress or highlight the challenges it faces in the course of conducting its activities. The reports may be disseminated to both national and international bodies.

This study found that the SAHRC reports on its activities related to refugee rights at both the national and international levels. However, the details and availability of such reporting varied. For instance, the SAHRC's report on the investigation into xenophobic violence against foreign nationals in 2008 was very comprehensive and remains the main reference document for demanding government accountability for the poor progress in efforts to address xenophobia.<sup>102</sup> In stark contrast, no formal reports have been published of its subsequent activities on xenophobia since 2008. For example, the fact-finding report on the conditions of encampment for refugees and other migrants in Durban following displacement due to xenophobic violence in the 2015 has not been published. Reference to the fact-finding

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<sup>102</sup> PMG, *SA Human Rights Commission Report on 2008 violence against non-nationals: Briefing*, Parliamentary Committee on Social Development, 23 November 2010 <https://pmg.org.za/committee-meeting/12409/> (Accessed 19 August 2019); Southern Africa Litigation Centre, Submission by the Southern Africa Litigation Centre to the South African Human Rights Commission in Preparation for the National Hearing on Social Cohesion and Xenophobia in South Africa, accessed 19 August, 2019, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/12/SALC-SAHRC-submission-2017-only.pdf>.



mission that took place is only available on media platforms.<sup>103</sup> Yet here too, and based on the media reports of concerns it raised, the SAHRC made findings relevant to the improvement of human rights situation of those displaced and broadly to address the underlying causes of xenophobia. Had these findings been made public, they could have served as vital information for advocacy efforts for other stakeholders. The SAHRC also hosted a national dialogue in 2018 on xenophobia and social cohesion, but as at the time of writing, this report was yet to be published.<sup>104</sup> Only one published Gender Commission report includes a reference to a refugee-related activity.<sup>105</sup>

The challenges that NHRIs face in documenting and disseminating their work for impact have been widely acknowledged.<sup>106</sup> GANHRI the global NHRI network found in its NHRI capacity assessments, that many NHRIs reported a lack of internal capacity to report effectively.<sup>107</sup> Concurring with this, one participant stated:

It is difficult to access information on the work that NHRIs do. Usually we stumble upon the information during conversations or when we send out a request for particular information. I often get surprised at the amount of work that NHRIs do that's not captured or reported on. It is usually in someone's computer.<sup>108</sup>

Barkow argues that one of the most powerful tools a public agency can have is the ability to “generate and disseminate information that is politically powerful” to the public.<sup>109</sup> She rests this argument on two notions: that the public may not have the tools to organise effectively; and that the public may not be aware that there is an issue worth fighting for because of the

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<sup>103</sup> e.g. ...”The commission had just conducted a fact-finding mission in Durban, KwaZulu-Natal, amid violence in the area that has left hundreds of foreigners displaced...” Yadhana Jadoo, “SAHRC: the Attacks are Xenophobic,” *The Citizen*, 15 April, 2015, <https://citizen.co.za/news/south-africa/363239/xeno-sahrc/>

<sup>104</sup> SAHRC, “SAHRC: The National Dialogue on Social Cohesion, Xenophobia and Migration, 7-8 February 2018,” SAHRC, accessed 19 August, 2019, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1143-media-advisory-national-investigative-hearing-on-migration-xenophobia-and-social-cohesion>.

<sup>105</sup> CGE, *Annual Report 2015/2016*, accessed 19 August, 2019, [www.cge.org.za](http://www.cge.org.za)

<sup>106</sup> Steven L. Jensen, *Lessons From Research on National Human Rights Institutions: A Desk Review on Findings Related to NHRIs*, (Copenhagen: DIHR, 2018), 26.

<sup>107</sup> GANHRI, OHCHR and UNDP, *Global Principles for Capacity Assessment of NHRIs*, (Geneva: GANHRI, 2016), 43.

<sup>108</sup> Interview with participant.

<sup>109</sup> Rachel E Barkow, “Insulating Agencies: Avoiding Capture through Institutional Design,” *Texas Law Review* 89 (December 2010): 59

absence of resources to monitor the government in a manner similar to interest groups.<sup>110</sup>

Thus, independent public institutions such as NHRIs play an important role in keeping the public informed about important issues in an independent manner. Barkow further adds that the information generation and dissemination processes must be supported by the capacity of an institution to undertake research based on credible data, but that the resultant studies and reports are only useful if they are disseminated to the public and utilised in political spaces and oversight hearings.<sup>111</sup> As such, the lack of effective reporting or complete absence thereof has a detrimental effect on the NHRIs role in influencing change for the effective realisation of refugee rights.

Despite some of the challenges faced with documenting and disseminating their activities, NHRIs have increased their visibility particularly at the international level by reporting on human rights issues including challenges, opportunities, or the status of realisation of rights. Indeed, the Paris Principles require that NHRIs actively engage with both regional and international human rights entities to ensure the promotion and protection of human rights.<sup>112</sup> The SAHRC stated that it is actively engaged with both the African Union and UN human rights bodies including the treaty bodies, other special mechanisms and processes on matters related to migrants, and where necessary, it highlights specific issues related to refugee rights.<sup>113</sup> For example, its engagement with the UN treaty body, the Committee on the Elimination of Racial Discrimination (CERD) shows some promising results with regard to demanding State accountability for the realisation of refugee rights.<sup>114</sup>

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<sup>110</sup> Rachel Barkow, "Insulating Agencies," 59

<sup>111</sup> Rachel Barkow, 60

<sup>112</sup> UN, *Paris Principles*, Section 3e.

<sup>113</sup> Interviews with participants. See also NHRIs' reports to these structures. For instance, the KNCHR's report to the Special Rapporteur on the right to safe drinking water and sanitation pointed out that urban refugees residing in low-income areas faced similar challenges with access to water and adequate sanitation that Kenyans did. KNCHR, *Status on the Right to Safe Drinking Water and Sanitation in Kenya: Submission to the Special Rapporteur on the Right to Safe Drinking Water and Sanitation February, 2014*. See also *The SowetanLive*, "Human rights watchdog to participate in review of SA report," 6 March 2016,

<https://www.sowetanlive.co.za/news/2016-03-06-human-rights-watchdog-to-participate-in-review-of-sa-report/>.

<sup>114</sup> SAHRC, *NHRI Report to CERD*.

The CERD's concluding observations to South Africa following its review in 2016, made extensive reference to the SAHRC's recommendations to the Committee as contained in its NHRI Report (shadow report). On xenophobia, the SAHRC brought to the Committee's attention the notion of "medical xenophobia" and highlighted its specific manifestations when migrants accessed health care services. These included:

The requirement that refugee patients produce identification documentation and proof of residence status before receiving treatment; health professionals refusing to communicate with patients in English or allow for the use of translators; treatment often accompanied with xenophobic statements, insults and other verbal abuse; non-South African patients being required to wait until all South African patients had received medical attention, even if they had been waiting longer for treatment; and, refugees and asylum seekers experienced difficulty accessing anti-retroviral treatment for HIV in public hospitals, resulting in their reliance on NGO treatment programmes.<sup>115</sup>

The SAHRC put forward specific recommendations to CERD, which were included by the Committee in its concluding observations, as highlighted below. The CERD urged South Africa to:

*Take measures to ensure that non-citizens have access to basic services such as health care and access to justice, without discrimination; provide language interpretation services to eliminate barriers in access to basic services; and conduct training for law enforcement officials and health and social service providers on the rights of non-citizens.*<sup>116</sup> [Author's own emphasis].

In addition, various other concluding observations reflected the SAHRC's contribution to the CERD. Following the release of the CERD's concluding observations, the Geneva-based GANHRI representative, stated that it was the first time since the formalization of the engagement between NHRIs and the treaty bodies began, that a Committee had incorporated

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<sup>115</sup> SAHRC, *NHRI Report to CERD*.

<sup>116</sup> CERD, *Concluding Observations: South Africa*.

in its concluding observations, extensive recommendations from an NHRI following a State's review.<sup>117</sup>

The third category of NHRI promotional activities is human rights education. There is no universally agreed upon approach to human rights education among NHRIs. However, the Danish Institute of Human Rights in consultation with other NHRIs developed a guide for NHRIs and human rights education.<sup>118</sup> The guide proposes that NHRI activities related to human rights education are those that fall within the definition of human rights education suggested by the Declaration on Human Rights Education.<sup>119</sup> The Declaration notes that human rights education is education about human rights, through human rights and for human rights.<sup>120</sup> This implies that human rights education is teaching that provides knowledge and understanding about human rights, in a manner that respects both the educator and the learner and empowers the person to enjoy, exercise, respect and uphold human rights.<sup>121</sup>

In addition, the Paris Principles recommend that NHRIs “assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles.”<sup>122</sup> NHRIs conduct human rights education so that targeted audiences gain knowledge on their rights and responsibilities and receive information on avenues for seeking redress where violations occur. Some NHRIs also have documentation centres or institutes to support this function.<sup>123</sup>

This study found that the SAHRC has conducted human rights education activities with respect to migrants' rights, though these were limited. The SAHRC conducts human rights

<sup>117</sup> Debriefing Session Between SAHRC Staff and GANHRI Geneva Representative, Geneva, 10 August 2016

<sup>118</sup> DIHR, *Guide to a Strategic Approach to Human Rights Education*. Copenhagen: DIHR, 2017.

<sup>119</sup> DIHR, *Guide to a Strategic Approach*.

<sup>120</sup> UN/A/ RES/66/137 *United Nations Declaration on Human Rights Education and Training*, accessed 4 September 2019 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf?OpenElement>

<sup>121</sup> United Nations Declaration on Human Rights Education and Training, Article 2.

<sup>122</sup> Paris Principles, Part A 3(f).

<sup>123</sup> These are NHRIs modelled as institutions created primarily to advance human rights through research and are found primarily in Europe the most notable examples being the German Institute for Human Rights, the Danish Institute for Human Rights human rights institutes. See chapter 2 on discussion on the evolution of NHRIs.

education through its Advocacy and Communications Unit. The SAHRC reported that the bulk of human rights education interventions are conducted at the provincial level and it would appear that reporting on the activities remains internal.<sup>124</sup> A review of its reports and materials on the SAHRC website did not identify any specific reports or materials that had been developed for human rights education on refugee rights. This is despite the SAHRC's designation of refugee rights as a priority thematic area in its work. A review of literature identified reference to only one training activity that the SAHRC conducted in 2008 with a UNHCR implementing partner, the University of Cape Town's Refugee Rights Unit. This was an outreach activity the SAHRC implemented to raise awareness about refugee and asylum seeker rights among this group in the wake of the 2008 xenophobic attacks.<sup>125</sup>

Human rights education would be particularly useful as a tool for targeting frontline service providers such as the police, healthcare providers, Department of Home Affairs officials and school administrators. That it appears underutilised reflects conclusions drawn by Carver and Keet that NHRIs tend to focus their work on protection of human rights.<sup>126</sup> Keet adds that the SAHRC has also grappled with a lack of staff with expertise as human rights educators.<sup>127</sup>

The fourth category of NHRI promotional activities is human rights awareness-raising. Human rights awareness-raising is done to promote a wide understanding and observance of human rights principles and standards.<sup>128</sup> There are various tools or avenues that NHRIs utilise to conduct promotional activities. These include seminars, workshops, campaigns, publications (e.g. pamphlets, booklets, websites, policy briefs etc.), making use of

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<sup>124</sup> The only report made available to the researcher was sourced directly from staff: SAHRC, *Africa Human Rights Day Dialogue*, 24 October 2018. East London: SAHRC, 2018.

<sup>125</sup> SAHRC, *Africa Human Rights Day*.

<sup>126</sup> OHCHR, *National Human Rights Institutions*, 2010; Andre Keet, "The Challenges for NHRIs and Human Rights Education," in Danish Institute for Human Rights, *The Role of National Human Rights Institutions in advancing Human Rights Education*, (Copenhagen: DIHR, 2014), 7-8.

<sup>127</sup> Andre Keet, "The Challenges for NHRIs," 7.

<sup>128</sup> OHCHR, *National Human Rights Institutions*, 2010.

the media and community-based initiatives. This study found that the use of awareness raising activities as an important avenue through which the NHRIs could inform the public, refugees, and asylum seekers about their mandate and the rights that refugees and asylum seekers are entitled to.

One of the SAHRC's important awareness-raising activities about refugee rights was the Roll Back Xenophobia campaign, which was launched in December 1998.<sup>129</sup> The Campaign was implemented together with the National Consortium on Refugee Affairs (NCRA)<sup>130</sup> and the United Nations High Commissioner for Refugees (UNHCR). This was a comprehensive and multifaceted campaign. It included seminars on forced migration, xenophobia and refugee rights with journalists and at universities, press conferences, public service announcements on print, television and radio, the publication and distribution of pamphlets, a magazine, a comic booklet, the broadcast of a radio series on community radio stations countrywide, and a refugee photography project.<sup>131</sup>

However, SAHRC's available public records do not indicate that it continued to implement this campaign beyond 2000, nor is there a public record of its report of the campaign except for a brief description in its Annual Report of 1998/1999.<sup>132</sup> Based on the review of the partner's reports, it appears that the SAHRC pulled out of the campaign.<sup>133</sup> This research could not identify any reasons why this occurred, but the perceived failure of the campaign to achieve its intended goals was laid at SAHRC's feet.

The Consortium of Refugees and Migrants in South Africa (previously NCRA) stated that the SAHRC's withdrawal damaged the effectiveness of the campaign and the ability to

<sup>129</sup> SAHRC, *Annual Report 1998/1999*, 12-13.

<sup>130</sup> NCRA is now known as Consortium of Refugees and Migrants in South Africa (CORMSA).

<sup>131</sup> Jennifer Parsley, "We Are Not Treated Like People": The Roll Back Xenophobia Campaign in South Africa," 2003, accessed 9 August, 2019, <https://odihpn.org/magazine/we-are-not-treated-like-people-the-roll-back-xenophobia-campaign-in-south-africa/>.

<sup>132</sup> SAHRC, *Annual Report*.

<sup>133</sup> UNHCR, *Protection from Xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes* (UNHCR: Johannesburg, 2015), 25.

continue raising awareness to address xenophobia.<sup>134</sup> The UNCHR also drew the same conclusion, stating: “a change in attitudes towards refugees and migrants requires that the SAHRC recommits itself to implementing on going national anti-xenophobia campaigns.”<sup>135</sup> The Roll Back Campaign has been cited by several studies as having had the potential to effectively address xenophobia in South Africa.<sup>136</sup> The impetus was lost due to the lack of follow up and the SAHRC has not implemented a similar activity since its participation in this campaign.<sup>137</sup>

In an assessment of the state of refugee protection in South Africa conducted in 2006, the Consortium of Refugee and Migrants in South Africa challenged the SAHRC to make effective use of its mandate to monitor the respect of refugee rights by renewing collaboration with NGOs, pursuing the implementation of its recommendations especially those related to xenophobia and increasing its visibility at the community level to further the realisation of refugee rights.<sup>138</sup> Despite the passage of more than a decade since the above assessment was conducted, the findings from this study reflect the perception that the SAHRC is not utilising its mandate effectively. Service provider and refugee participants concurred in their conclusion that the three primary NHRIs were reluctant to utilise their powers. As one service provider participant stated: “But like I said maybe people tried them once or twice then found that they are useless so they don’t go back.”<sup>139</sup> Likewise, a refugee participant concluded:

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<sup>134</sup> NCRA, *Refugee Protection in South Africa*.

<sup>135</sup> UNHCR, *Submission to the Public Hearings on Xenophobia, held Jointly by the Parliamentary Portfolio Committee on Foreign Affairs and the South African Human Rights Commission on the Impact of Xenophobia on Refugees and Asylum Seekers*, 28 October 2004, accessed 22 October 2018, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/041102unhcr.htm>.

<sup>136</sup> Sarah Pugh, “Advocacy and Civil Society”; Ilgit and Klotz, “How Far Does ‘Societal Security’”; Jean Pierre Misago, Iriann Freemantle and Loren B. Landau, *Protection from Xenophobia: An Evaluation of UNHCR’s Regional Office for Southern Africa’s Xenophobia Related Programmes*, Pretoria: UNHCR, 2016, 25; Sergio Carciotto and Mike Mavura, *The Evolution of Migration Policy*, 25; Jonathan Crush and Sujata Ramachandran, *Xenophobia, International Migration and Human Development* (rep., 1-104). New York: United Nations Development Programme. Human Development Reports, Research Paper 2009/47, 2009, 88, accessed 4 July, 2018, <https://pdfs.semanticscholar.org/eb20/18d333f82931128944ce1b11a6843de5fca4.pdf>.

<sup>137</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>138</sup> CORMSA, *Refugee Protection in South Africa: Summary of Key Findings* (Johannesburg: CORMSA, 2006), 4.

<sup>139</sup> Interview with service provider 1, Durban, South Africa

“Maybe they are doing something underground. They can issue a statement but that’s about it.”<sup>140</sup>

#### 6.4.2 NHRI Protection activities

The three general categories of activities that fall within the protection mandate are complaints handling, conducting investigations, and monitoring.<sup>141</sup> The Paris Principles do not require that NHRIs have a protection mandate or quasi-judicial competence. Rather, they suggest that should this be the case, then there are certain elements of the protection mandate that should be met. These are that the NHRI should “hear and consider complaints and petitions concerning individual situations... brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations.”<sup>142</sup> This simply means that the NHRI with a protection mandate can handle complaints and conduct investigations. Generally, in its enabling law, the NHRI will be granted powers to investigate, monitor human rights and to accept and investigate individual complaints. All three primary NHRIs in South Africa referred to in this study have quasi-judicial powers prescribed by law.

In terms of complaints handling, NHRIs hear individual complaints from members of the public. These can be lodged directly by an individual or individuals. They can also be lodged on behalf of an individual or individuals by a third party. It is a mechanism that allows the NHRIs to interface directly with the public. It enhances accessibility, to remedies in a cost-effective manner, especially for vulnerable groups, as the service is provided freely. In cases where an NHRI cannot deal with a matter, the presence of a referral system is envisaged to enable the complainant access to a remedy.

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<sup>140</sup> Interview with refugee participant 1, Durban, South Africa

<sup>141</sup> OHCHR, *National Human Rights Institutions*.

<sup>142</sup> Paris Principles, “Additional principles concerning the status of commissions with quasi-judisdictional competence.”



However, there are inherent challenges that affect this mechanism. For example, the NHRI can be overloaded with complaints, taking away resources that could be utilised to address priority human rights issues. Where a caseload is high and capacity is limited, the NHRI could be faced with a large number of unresolved cases or cases might take too long to resolve. Thus, NHRIs with dual mandates need to be able to balance the promotion and protection mandates to avoid diverting from dealing effectively with priority human rights concerns.

This study found that of the three NHRIs, it is the SAHRC, which has reported the highest number of complaints related to migrants, refugees, and asylum seekers. Its annual reports indicate that complaints relating to discrimination on the basis of ethnic or social origin have constituted between seven per cent and ten per cent of all discrimination complaints.<sup>143</sup> Based on a review of published reports of concluded individual complaints and media reports, this study determined that other complaints that the SAHRC handled that related to migrants, refugees or asylum seekers involved administrative action, unlawful detention, arbitrary arrests, ill-treatment, violence, access to health and access to education (including discrimination when accessing these rights).<sup>144</sup>

The SAHRC has achieved some significant results with regard to the protection of refugee and asylum seekers' rights through the complaints handling function. For example, in *South African Human Rights Commission v Minister of Home Affairs*, the court ruled that the Department of Home Affairs must grant the SAHRC regular access to South Africa's immigration detention centre known as *Lindela*, to monitor the situation of detainees.<sup>145</sup> The court also ordered the Department to submit to the SAHRC, quarterly reports on the details

<sup>143</sup> SAHRC *Annual Report*, 2017/2018.

<sup>144</sup> E.g. SAHRC, *MT v Refugee Appeal Board & Others*, GP/1415/0433, accessed 6 June 2018, <https://www.sahrc.org.za/home/21/files/Investigative%20Report%20-%20MT%20v%20RAB%20GP%201415%200433%20Final.pdf> Bongani Majola [SAHRC Chairperson], "Refugees have an Equal Right to Healthcare," *Mail & Guardian*, 23 June 2017, <https://mg.co.za/article/2017-06-23-00-refugees-have-an-equal-right-to-healthcare>; Interview with participant.

<sup>145</sup> *SAHRC v Minister of Home Affairs* (2014).

and status of the detainees, including reasons for detention.<sup>146</sup> An initial baseline assessment of the conditions of detention at the facility had identified refugees and asylum seekers among those detained.<sup>147</sup> Subsequent to the ruling, the Department's reports indicate that no refugee or asylum seeker has since been detained in the facility.<sup>148</sup> These reports are verified independently by the SAHRC.<sup>149</sup>

Since the court ruling was made in 2014, the SAHRC has been designated the national preventive mechanism (NPM) under the Optional Protocol to the Convention against Torture (OPCAT).<sup>150</sup> This designation as South Africa's monitoring mechanism for torture prevention will, at least in theory, increase access to other places of detention where asylum seekers and refugees may be held. The NHRI participant acknowledged that this designation would enhance its role in protecting refugee rights.<sup>151</sup> This assertion finds credence in Welch's findings with respect to NHRIs' impact on the decline of the use of torture in a country.<sup>152</sup> Welch's study found that the ability of NHRIs to generate information about prevalence of torture had resulted in the decline of the use of torture by State apparatus.<sup>153</sup> He attributed this decline to the utility function that the information serves. Those with

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<sup>146</sup> *SAHRC v Minister of Home Affairs* (2014).

<sup>147</sup> SAHRC, *Lindela Investigation Report*.

<sup>148</sup> Interview with NHRI participant 1, Johannesburg, South Africa; These reports have not been made public.

<sup>149</sup> Interview with NHRI participant 1. Johannesburg, South Africa.

<sup>150</sup> SAHRC, "Media Statement: SAHRC welcomes the cabinet decision on the ratification of OPCAT," 4 March 2019. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1786-media-statement-sahrc-welcomes-the-cabinet-decision-on-the-ratification-of-opcat>.

Under the OPCAT States are required to establish a national preventive mechanism (NPM) to monitor places of deprivation of liberty on an announced or unannounced basis in order to prevent torture and other cruel, inhuman, degrading treatment or punishment. Article 3 and 17 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>, accessed June, 2017.

<sup>151</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>152</sup> Ryan Welch, "National Human Rights Institutions: Domestic implementation of international human rights law," *Journal of Human Rights* 16, no.1 (2017): 96–116, <http://dx.doi.org/10.1080/14754835.2015.1103166>; Earlier proposals for the potential role for NHRIs under OPCAT included Elina Steinerte, "The African National Human Rights Institutions, 87-112.

<sup>153</sup> The data covers 153 countries between the years 1981-2007.

information have a higher recourse to seek redress resulting in the State's reluctance to use torture.<sup>154</sup>

Steinerte, as referred to earlier, had identified the potential that an NPM designation had for an NHRI to make significant contributions to promoting and protecting refugee rights in places where they are deprived of their liberty.<sup>155</sup> In the SAHRC's case, its designation formalises a role it had taken on through an implied interpretation of its mandate. This provides it with a stronger legal basis for expanding its role within the context of prevention of torture and other forms of ill-treatment including with respect to refugees and asylum seekers.

In addition, tools designed specifically for African NHRIs to engage with prevention of torture are already available and would not require that the SAHRC commit additional resources to develop new tools, except if there was need to adapt them to include special considerations for refugees and asylum seekers. It would also be important for the SAHRC to pay particular attention to its technical capacity to ensure that it undertakes this aspect of its mandate effectively. As will be discussed in section 6.5, the SAHRC has faced challenges in effectively deploying human resources with respect to refugee rights and has at times created the impression, among stakeholders, that it does not have the requisite expertise in addressing refugee rights.

In *MT v Refugee Appeal Board*, the SAHRC's investigation into a complaint on administrative justice resulted in the Department of Home Affairs formally requesting the UNHCR for technical assistance to address the asylum application and appeals backlog.<sup>156</sup> It

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<sup>154</sup> Ryan Welch, "National Human Rights Institutions," 96-116.

<sup>155</sup> Elina Steinerte, "African NHRIs and the Protection of Asylum Seekers, 88

<sup>156</sup> Note here that the DHA has repeatedly requested for this support since the 1990s but the asylum backlog has yet to be resolved. See discussion in this chapter under political will. SAHRC, *MT v Refugee Appeal Board & Others*, GP/1415/0433, accessed 6 June, 2018, <https://www.sahrc.org.za/home/21/files/Investigative%20Report%20-%20MT%20v%20RAB%20GP%201415%200433%20Final.pdf>.

also led to the SAHRC's decision to develop a strategy to address the systemic issues that affect access to asylum and the protection of refugee rights.<sup>157</sup>

The Gender Commission and the Public Protector have also handled complaints on violations of rights of refugees and asylum seekers. This study identified two reports of complaints published by the two institutions. Other cases were inferred through reports of activities undertaken in collaboration with other partners or CSOs.<sup>158</sup> Only one participant knew of a refugee who had filed a complaint with the Public Protector relating to delays in the adjudication of an asylum application by the Department of Home Affairs.<sup>159</sup> The complaint lodged with the Gender Commission related to access to reproductive health services.<sup>160</sup> This was filed by a group of women, which included refugee women.<sup>161</sup> No information was made available about the current status of the complaint.

With respect to the Public Protector, a complaint was lodged about corruption and maladministration at the Department of Home Affairs' Johannesburg Refugee Reception Office in 2004.<sup>162</sup> The Public Protector found that the Department was failing in its duties and responsibilities with respect to refugees and asylum seekers.<sup>163</sup> There was no evidence of follow up with Department by the Public Protector. The Johannesburg refugee office was subsequently closed in 2011 following a court order that determined that the office had been established in contravention of zoning requirements.<sup>164</sup> Reports indicate that at the time of its closure, the Johannesburg refugee office had made efforts to improve its administrative processes to improve data capture, curb loss of files and to address corruption.<sup>165</sup> It is not

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<sup>157</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>158</sup> FHR, *Refugee Report*, 2012; Commission for Gender Equality, *Chatsworth report*, 2015.

<sup>159</sup> Interview with refugee participant 3, Durban, South Africa.

<sup>160</sup> Commission for Gender Equality, *Annual Report 2015/2016*, 3-34 para 9.1.5 [www.cge.org.za](http://www.cge.org.za).

<sup>161</sup> Commission for Gender Equality, *Annual Report 2015/2016*, 33-34.

<sup>162</sup> HRW, *Living on the Margins*; Public Protector of South Africa, *Report on an Investigation*, 3-4

<sup>163</sup> HRW, *Living on the Margins*

<sup>164</sup> See Lawyers for Human Rights (LHR), "*LHR Dismayed at Closure of Refugee Reception Office in Johannesburg*," LHR, accessed 3 September, 2019, <https://www.lhr.org.za/news/2011/lhr-dismayed-closure-refugee-reception-office-johannesburg>.

<sup>165</sup> Lawyers for Human Reports (LHR), *LHR dismayed at closure*.

apparent if these improvements were because of the Public Protector's findings and recommendations for remedial action.

In 2012, the Public Protector participated in an assessment of the situation of refugees and non-nationals in South Africa.<sup>166</sup> The report mentions that the Public Protector received complaints during the exercise.<sup>167</sup> However, the report did not provide any additional information about the number or the nature of the complaints. In addition, the final report did not proffer any recommendations to the Public Protector on its role to advance the promotion and protection of refugee and asylum seekers' rights. A further review of the published investigations of the Public Protector did not identify any matter related to either refugees or asylum seekers, except for the above-mentioned refugee reception office investigation.<sup>168</sup>

All participants acknowledged that the SAHRC's complaints handling function was important, but some reported frustration with the process. The primary concern was the length of time it took to finalise a complaint. As one participant stated: "Complaints are handled very slowly. Sometimes matters are finalized long after the issue has run its course."<sup>169</sup> This perception is reflected in media reports and other CSO reports, which detail the inordinate length of time the SAHRC took to respond to and to investigate complaints, which were particularly critical and time sensitive.<sup>170</sup>

This challenge corresponds to conclusions from studies, which have found that the complaints handling function can be extremely demanding on an NHRI's resources, with

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<sup>166</sup> FHR, *Refugee Report: Assessment of the Human Rights Situation of Refugees and Non-nationals July 2011 – April 2012*, accessed 2 August, 2017, [http://www.fhr.org.za/files/1214/0016/1064/REFUGEES\\_AND\\_NON\\_NATIONALS\\_ASSESSMENT\\_2012\\_FINAL\\_REPORT.pdf](http://www.fhr.org.za/files/1214/0016/1064/REFUGEES_AND_NON_NATIONALS_ASSESSMENT_2012_FINAL_REPORT.pdf).

<sup>167</sup> FHR, *Refugee Report*, 2012.

<sup>168</sup> The report of the investigation is no longer available on its website.

<sup>169</sup> Interview with service provider participant 4, Cape Town, South Africa.

<sup>170</sup> Joan van Dyk, *Does South Africa need a Human Rights Commission?* <https://bhekisisa.org/article/2018-07-04-00-power-and-crisis-why-sas-watchdogs-are-more-bark-than-bite/>, accessed 6 September 2019, SONKE, "Timeline of complaint against DM Mkongi," accessed 21 May, 2019, <https://genderjustice.org.za/publication/timeline-of-complaint-against-dm-mkongi/>

negative consequences for efficient delivery of results.<sup>171</sup> This is a challenge that the SAHRC acknowledges.<sup>172</sup> One participant opined that it would be a mammoth task and unrealistic approach for the SAHRC to utilise the individual complaints handling mechanism, to try to resolve the challenges that refugees and asylum seekers faced.<sup>173</sup> In addition, service provider and refugee participants expressed little confidence that the Public Protector had the capacity to offer any remedies. None of the participants had lodged a complaint with the Gender Commission, nor were they aware of any refugee or asylum seeker who had.

Another challenge identified related to reporting of findings. As Barkow notes, the ability to publish findings and to disseminate them is critical in influencing change.<sup>174</sup> This ability needs to be supported by mechanisms that allow for the interpretation of data in a meaningful way.<sup>175</sup> This study found that the NHRIs did not report findings or statistics on refugee and asylum seeker cases in a manner that would highlight their vulnerability to human rights violations. It was quite difficult to determine the exact number of and nature of the cases handled, as published reports contained limited information and where available they were reported on broadly.<sup>176</sup>

For example, the SAHRC does not publish a report with a detailed analysis of the complaints it handles. Rather, it produces a report, referred to as the Trends Analysis report, which provides an overview of complaints handled in a given year.<sup>177</sup> Thus, it is quite difficult to draw any conclusions, based on their published reports, about who reports, why they report and how they get to report violations to the SAHRC. Similarly, delays in

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<sup>171</sup> Richard Carver and Alexey Korotaev, *Assessing the Effectiveness of National Human Rights Institutions*, October 2007; Katerina Linos and Tom Pegram, *Interrogating Form and Function*, 30-31

<sup>172</sup> Interview with service provider participant 1, Johannesburg, South Africa. See also SAHRC CEO's responses in an article questioning the value of the SAHRC. Joan van Dyk, *Does South Africa need a Human Rights Commission?*

<sup>173</sup> Interview with service provider participant 1, Johannesburg, South Africa.

<sup>174</sup> Rachel E. Barkow, "Insulating Agencies, 59.

<sup>175</sup> See, Commonwealth Ombudsman, *Better Practice Guide .to Complaint Handling* (Canberra: Commonwealth Ombudsman, 2009).

<sup>176</sup> Despite repeated requests for data on complaints received from refugees and asylum seekers from the SAHRC and the KNCHR, this information was not made available to the researcher.

<sup>177</sup> SAHRC, *Trends Analysis Report 2016/2017*.

reporting on findings or not reporting them at all, impacts on the perceived usefulness of investigations. For instance, the SAHRC held a national dialogue on migration and social cohesion in March 2018, which included submissions and discussions on the challenges of asylum in South Africa. The report and recommendations from this dialogue are yet to be published. It is not apparent why such delays occur, but this thesis notes that NHRIs face challenges reporting on their activities and reporting for impact (see section 6.4.1 above). However, parliament, which plays an oversight role over NHRIs, can request, during review meetings, for release of NHRI reports within specified time frames.

Finally, the question of access to NHRIs is an important aspect to consider especially in the context of seeking redress for human rights violations. According to Carver, access usually takes the form of physical access to the institutions or to its representatives, and through other platforms such as electronic means and includes other factors such as ‘child friendliness’ or being culturally accessible.<sup>178</sup> Carver also identifies physical accessibility, which includes having offices or representatives located throughout the country, as an important factor in determining NHRIs’ effectiveness.<sup>179</sup> However, studies show that few NHRIs have the capacity to have presence outside of urban and peri-urban areas, usually because of limited funding.<sup>180</sup> This makes accessibility to institutions difficult and results in the focus on issues that emerge in urban areas, which may not necessarily be the most urgent human rights issues.<sup>181</sup>

This study found that the SAHRC meets this basic criterion of physical accessibility. It has ten offices; one being its headquarters and the other nine are located in each of the country’s nine provinces. All ten offices are located in urban areas, usually within the central business districts of the provincial capital or a major metropolis (as is the case of the two

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<sup>178</sup> Richard Carver, “One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? Lessons from the European Experience,” *Journal of Human Rights Practice* 3, no.11 (March 2011), 16

<sup>179</sup> Richard Carver, “One NHRI or Many?”, 16.

<sup>180</sup> NANHRI, *Study on the State of African NHRIs*; NANHRI, *Mapping Survey of Complaints Handling*.

<sup>181</sup> Carver, “One NHRI or Many?”, 16.

offices in Johannesburg). However, an NHRI's offices must be accessible to all and while the SAHRC has a relatively good geographic spread compared to other African NHRIs,<sup>182</sup> the location of its offices in urban areas has drawbacks to its accessibility.

For instance, the SAHRC receives complaints primarily from those residing in urban areas and conducts many of its activities such as national inquiries, dialogues, and workshops in Johannesburg.<sup>183</sup> This has resulted in engagement with stakeholders located primarily in Johannesburg as reflected in one participant's comment: "It is not easy to determine what kind of information trickles down to Cape Town. For instance, I'm not aware about the Section 11 Committee perhaps because it sits in Johannesburg. The LHR [Lawyers for Human Rights] is more involved with the SAHRC based on proximity. For us it's a struggle being included in all this, hearings crop up at the last second."<sup>184</sup>

In order to improve access, the SAHRC reported that it hosts periodic human rights clinics in informal settlements, peri-urban and rural areas. However, there was no information available to indicate that any of these human rights clinics targeted refugees or asylum seekers, despite many of them living in informal settlements.<sup>185</sup>

The second category of protection activities is investigations, which usually take the form of public inquiries or public hearings and tend to deal with systemic violations.<sup>186</sup> These forums examine how laws, policies, practices, patterns of behaviour and ingrained attitudes, can operate in violation of human rights norms and standards in a general manner.<sup>187</sup> As such, the underlying reason for using such investigation techniques is that the human rights

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<sup>182</sup> NANHRI, *Study on the State of African NHRIs*.

<sup>183</sup> See SAHRC, *Trends Analysis Report*, 2016/2017.

<sup>184</sup> Interview with service provider participant 5, Cape Town, South Africa

<sup>185</sup> Jonathan Crush, Godfrey Tawodzera, Cameron McCordic, Sujata Ramachandran and Robertson Tenge, *Refugee Entrepreneurial Economies in Urban South Africa*: 783-819, 787 [https://sihma.org.za/wp-content/uploads/2017/09/2\\_Refugee-Entrepreneurial-Economies-in-Urban-South-Africa-min.pdf](https://sihma.org.za/wp-content/uploads/2017/09/2_Refugee-Entrepreneurial-Economies-in-Urban-South-Africa-min.pdf).

<sup>186</sup> OHCHR, *NHRI Handbook*, 77-81.

<sup>187</sup> OHCHR, *NHRI Handbook*, 77-81.



concern is systemic in nature or affects a large segment of the population. Therefore, the individual complaints mechanism would not suffice given the broader interests.

This study found that the SAHRC also utilises this format to protect the rights of migrants, refugees, and asylum seekers and has convened a number of public hearings on xenophobia and social cohesion.<sup>188</sup> Except for one held in 2004, these public hearings have not been conceptualised to elicit the specific challenges that refugees and asylum seekers face.<sup>189</sup> In addition, the majority of the SAHRC's public hearings relate to violations of socio-economic rights.<sup>190</sup> However, none of these hearings have included specific considerations on refugee and asylum seekers' access to these rights.<sup>191</sup> This is a significant protection gap given available evidence, including from complaints it receives, that many refugees and asylum seekers in South Africa face high levels of discrimination and difficulties accessing socio-economic rights.<sup>192</sup>

There is also a need to address the conflation of the various categories of migrants. The hearings, conceptualised as they are, do not address this aspect of the problem. The opportunity to foster an understanding that refugees and asylum seekers require a different degree of protection may be missed altogether. In addition, this study found that the continued challenge presented by xenophobia has created perceptions that the SAHRC's capability to influence change through using the format of hearings is weak.

The Gender Commission has also utilised its investigative powers to assess conditions of encampment for displaced refugees. In April 2015, a large number of foreign nationals

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<sup>188</sup> Information available on its website and media statements issued; Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>189</sup> Its 2004 hearing on xenophobia held together with the Parliamentary Committee did include discussions on refugees and asylum seekers; all its subsequent hearings and dialogues have been conceptualized broadly to discuss 'migrants.'

<sup>190</sup> SAHRC, *ECOSOC reports, Section 184 (3) Reports*, accessed 12 May, 2018, [www.sahrc.org.za](http://www.sahrc.org.za)

<sup>191</sup> Based on a search of web-published ECOSOC or Section 184 (3) Reports using the terms "refugee" and "asylum seeker."

<sup>192</sup> SAHRC, *NHRI CERD Report*; SAHRC, *Migrants denied access to health care*; Roni Amit and Norma Kriger, "Making migrants 'il-legible'; see also LHR report; Roni Amit, *Queue Here for Corruption*; Bongani Majola "Refugees have an Equal Right."

including refugees were displaced following xenophobic attacks in parts of Durban. Three shelters were initially set up to host over 4000 displaced persons, but as the violence subsided and number of displaced people reduced, the shelters were consolidated into one. This was set up in Chatsworth, a suburb in Durban, and had population of 187 displaced persons.<sup>193</sup>

The objectives of the mission were to assess the shelter's compliance with minimum standards set by the UNHCR; to determine the situation for women and children in the shelters; to gather data to inform a report on the plight of women foreign nationals who are victims of xenophobic violence in the province; and to assess possibilities for legal assistance for gender related complaints.<sup>194</sup> The Gender Commission conducted focus group discussions with the displaced persons, many of whom were later determined to be refugees in possession of valid refugee identity documents and some were asylum seekers with permits.

The Gender Commission made findings with respect to the right to decent and proper housing, the state of security, right to water and sanitation, right to food, right to health and the right to education. These were assessed based on the UNHCR's minimum standards.<sup>195</sup> The findings indicated that the overall establishment and management of the site partly complied with the UNHCR guidelines. However, not all minimum requirements had been met.<sup>196</sup> For instance, while there was access to health services, the Gender Commission found that no specific care was provided for pregnant women.<sup>197</sup> It proposed a number of recommendations including those that addressed pertinent issues that affected women and children, thus highlighting the need to improve women's access to health and privacy and children's access to education.<sup>198</sup> The Gender Commission also recommended that the provincial government should tackle xenophobia using a multi-sectoral approach which

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<sup>193</sup> Commission for Gender Equality, *Chatsworth Report*, 6.

<sup>194</sup> Commission for Gender Equality, *Chatsworth Report*, 6

<sup>195</sup> Commission for Gender Equality, *Chatsworth Report*, 6-22.

<sup>196</sup> Commission for Gender Equality, *Chatsworth Report*, 26-30.

<sup>197</sup> Commission for Gender Equality, *Chatsworth Report*, 17, 30.

<sup>198</sup> Commission for Gender Equality, *Chatsworth Report*, 32-34.

includes community level engagement, giving due regard to women's experiences with xenophobia.<sup>199</sup> The Gender Commission and the SAHRC did not collaborate in this monitoring exercise, despite the opportunity to do so. The SAHRC conducted its own visits to the shelters to assess the conditions of displacement.<sup>200</sup> The manner in which the SAHRC and the Gender Commission undertook these interventions is another indication of the lack of strategic collaboration, as discussed in section 6.2 above.

### **6.5 Capacity constraints negatively impact on the extent to which the NHRIs can effectively promote and protect refugee rights**

This study found that capacity constraints impact negatively on the extent to which the NHRIs can effectively promote and protect refugee rights. Capacity constraints, usually in the form of financial and human resources, have often been cited as key challenges that impede NHRI effectiveness.<sup>201</sup> The SAHRC acknowledged that it faced significant financial and human resource constraints that impeded its work generally but also with respect to the promotion and protection of refugee rights. Service provider participants also felt that capacity constraints limited the NHRI's effectiveness, as one participant lamented: "They [SAHRC] always complain about being under-resourced and understaffed."<sup>202</sup>

These particular challenges are reflected in Hyman and Kovacic's argument about the requirements for effective implementation of policy or institutional mandates.<sup>203</sup> They suggest that effective implementation should be understood in terms of capacity and capability. The criteria they suggest for capacity is "the necessary critical mass of human

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<sup>199</sup> Commission for Gender Equality, *Chatsworth Report*, 33.

<sup>200</sup> SAHRC, "Media Statement: SAHRC condemns xenophobic attacks on foreign nationals," *SAHRC*, 17 April 2015, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/318-media-statement-sahrc-condemns-xenophobic-attacks-on-foreign-nationals>.

<sup>201</sup> NANHRI, *Study on the State of African NHRIs*; OHCHR's assistance to NHRIs has focused heavily on capacity building. See OHCHR, *Evaluation of OHCHR Support to National Human Rights Institutions*. Geneva: OHCHR, 2015.

<sup>202</sup> Interview with service provider participant 6, Durban, South Africa

<sup>203</sup> David A. Hyman and William E. Kovacic, "Why Who Does What Matters: Governmental Design and Agency Performance," *The George Washington Law Review* 82, no.5 (October 2014): 1474.

talent and supporting resources to perform the assigned functions well.”<sup>204</sup> Capability, they assert, is whether an agency has statutory powers, organisational structure, and quality control mechanisms to make good decisions and apply its authority effectively.<sup>205</sup> This section will discuss the findings based on these two elements.

Responses from the SAHRC confirmed that capacity constraints limited the nature and scope of the interventions taken to advance refugee rights. In terms of human resources, the SAHRC pointed out that it lacked sufficient personnel to deal with refugee and asylum seeker related interventions. For example, the findings in the *South African Human Rights Commission v Minister of Home Affairs* required the SAHRC to monitor the *Lindela* repatriation centre on at least a quarterly basis. However, the SAHRC did not comply with this ruling until 2019, citing budgetary constraints and the lack of human resources.<sup>206</sup>

The findings also show that the organisational structure has had an impact on the NHRIs’ capability to engage substantively with asylum-related matters. For the SAHRC, an organisational restructuring process has had a serious impact on the nature of engagement and capacity to deal with refugee rights.<sup>207</sup> Until 2012, the SAHRC had a dedicated staff member tasked with coordinating all aspects of the institution’s work with respect to migrants.<sup>208</sup> This was a national coordinator for non-nationals (the term SAHRC uses when referring to migrants) and the position was located within the Research Department.<sup>209</sup> A Commissioner then provided strategic oversight over the SAHRC’s work related to migration.

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<sup>204</sup> Hyman and Kovacic, “Why Who Does What Matters,” 1474.

<sup>205</sup> Hyman and Kovacic, 1474.

<sup>206</sup> Interview with NHRI participant 1, Johannesburg, South Africa; See also interview with SAHRC CEO, in Joan van Dyk, “Does South Africa Need.”

<sup>207</sup> SAHRC, *Annual Report*, 2013/2014; SAHRC, Terms of Reference: SAHRC Organisational Renewal: Culture change management project, February 2019.

<sup>208</sup> SAHRC restructuring process was completed in 2012. See SAHRC, *Annual Report*, 2013/2014

<sup>209</sup> SAHRC, *Annual Report*, 2011.

Evidence from the SAHRC's reports, submissions to Parliament and presentations in various fora, indicates that this work, as supported by the national coordinator, focused on refugees, asylum seekers and undocumented migrants.<sup>210</sup> The engagement with asylum related matters and stakeholders within the sector appeared robust and substantive.<sup>211</sup> However, this position was made redundant in 2012, following the restructuring of the institution.<sup>212</sup>

Within the present organisational structure, a research advisor supports the Commissioner who is tasked with dealing with migration as a focus area. The current research advisor does not have any training in refugee or asylum law nor has the incumbent previously worked on migration issues.<sup>213</sup> The SAHRC, however, indicated that there is another research advisor on staff with the requisite competence in refugee law who is consulted where necessary.<sup>214</sup> This research advisor is currently tasked with dealing with the right to health and supports the Commissioner assigned to the health focus area. In addition, the SAHRC's research department does not provide direct support for this focus area. A review of all the research reports published by the research department on the SAHRC's website, did not identify specific findings or recommendations related to the realisation of rights of migrants in general nor of refugees and/or asylum seekers in particular.<sup>215</sup>

This finding shows that there is a discrepancy with the deployment of staff within the SAHRC - at least with respect to effectively meeting the technical capacity required to

<sup>210</sup> E.g. Joyce Tlou, Speech by Non-Nationals Coordinator on vulnerability of migrants to Xenophobia, New York, 4 May 2011, <https://www.sahrc.org.za/index.php/sahrc-media/news/item/34-speech-by-non-nationals-coordinator-on-vulnerability-of-migrants-to-xenophobia>; PMG, "Draft Report By The South African Human Rights Commission on the Open Hearings on Xenophobia and Problems Related to It Hosted by the SAHRC and the Parliamentary Portfolio Committee" PMG, 29 July 2005.

<sup>211</sup> As discussed previously, SAHRC was a founding member of CoRMSA and its work on addressing xenophobia; See also submission by refugee rights network *Tutumike* to parliament and role played by SAHRC in promoting and protecting the rights of refugees and asylum seekers <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070612tutumike.htm>; Also evidenced by the SAHRC's strong partnership with Lawyers for Human Rights and Legal Resource Centre, the two prominent legal services providers for refugees and asylum seekers

<sup>212</sup> SAHRC, *Annual Report*, 2012/2013.

<sup>213</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>214</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>215</sup> SAHRC, *Publications*, accessed 7 June, 2018, <https://www.sahrc.org.za/index.php/publications>.

address the challenges with the realisation of refugee rights. Participants identified this issue as a problem. One participant stated: “I think they need to get some people who have a lot of knowledge on refugee law and the process because a lot of people [from the SAHRC] I’ve spoken to, I have to explain a lot of what’s happening and that’s fine to a certain degree, but if the people writing the reports are kind of unsure about the things then that’s problematic.”<sup>216</sup> Another participant asserted: “It would help if they handled more individual cases from refugees. This would build knowledge and understanding within the organization about what’s actually going on.”<sup>217</sup>

The proposed guidelines for the assessment of effectiveness of NHRIs notes: “if a national institutions is to work effectively, its members and staff need to possess the necessary professional skills, including expertise in human rights.”<sup>218</sup> In addition, the Network of African NHRIs has emphasised the need for African national human rights institutions to have or acquire specialised technical capacity for the promotion and protection of human rights.<sup>219</sup> Thus, the reform of the SAHRC and the manner in which staff have been deployed has curtailed its capacity to adequately engage with the promotion and protection of refugee rights. While the SAHRC’s mandate is not explicit with respect to the promotion and protection of refugee rights, its decision to designate these rights as a priority thematic area implies the recognition of the need to commit the requisite resources and enhance its technical capacity to engage effectively with refugee rights. That it has not done so may be because of factors outside its control, such as limited budgetary allocation from the government, high staff attrition, or the absence of a strategic plan to effectively utilise the

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<sup>216</sup> Interview with service provider participant 4, Cape Town, South Africa.

<sup>217</sup> Interview with service provider participant 1, Durban, South Africa.

<sup>218</sup> International Council for Human Rights Policy, *Assessing the Effectiveness* (Versoix: ICHRP and OHCHR, 2005), 15.

<sup>219</sup> NANHRI, *Study on the State of African NHRIs*, 84.

resources at its disposal through its links with credible refugee rights CSOs (for instance the Consortium for Refugees and Migrants (CoRMSA)).<sup>220</sup>

Additionally, this study found that the focus area on migration has not translated into the mainstreaming of migrants rights into the other areas of the NHRIs' work. In the case of the SAHRC, a review of its published reports, whether on civil and political rights, equality or socio-economic and cultural rights did not find a specific inclusion of such rights. The only reports that address aspects of challenges that migrants, refugee and asylum seekers face, were contained in the SAHRC's reports to treaty bodies as part of the government's review.<sup>221</sup>

Compounding the staffing issue is the fact that the current Commissioner serves dual focus areas, with the second focus area being the promotion and protection of children's rights. These focus areas are addressed independently with issues affecting migrant children, regardless of status, addressed as they arise rather than strategically within the migrants' rights portfolio.<sup>222</sup> In fact, two participants raised concerns about the lack of NHRI engagement with matters related to refugee children and those children seeking asylum. These concerns related to access to education, access to documentation, the plight of unaccompanied minors and those rendered stateless due to the lack of documentation. However, except for the question of access to basic education, the NHRI participant stated

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<sup>220</sup> The SAHRC was a founding member of CoRMSA, but has since withdrawn its membership. CoRMSA "builds the capacity of member organisations to ... equip them with the needed skills and knowledge to be effective advocates on migration, human rights, social justice and development issues. It also "facilitates the creation and maintenance of provincial, national and regional networks and working groups to promote collective engagement on issues..." CoRMSA, "What We Do," *CoRMSA*, accessed 1 July 2020, <https://www.cormsa.org.za>.

<sup>221</sup> SAHRC, *South African Human Rights Commission: List of Issues Report to the Human Rights Committee on South Africa's Implementation of the International Covenant on Civil and Political Rights*, April 2015, accessed 18 June, 2017, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT\\_CCPR\\_ICO\\_ZAF\\_20239\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_ICO_ZAF_20239_E.pdf); SAHRC, *National Human Rights Institution Report on the South African Government's combined Fourth to Eight Periodic Country Report under the International Convention on the Elimination of Racial Discrimination*, August, 2016, accessed 18 June, 2017, <https://www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20REPORT%20TO%20CERD-%20FINAL%2025.7.16.pdf>.

<sup>222</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

that the institution had not identified any systemic issues that affected refugee children or those seeking asylum.<sup>223</sup>

Systemic issues affecting migrant children including refugee children in South Africa have been widely documented.<sup>224</sup> These issues, as reported by the service provider and refugee participants and as corroborated by several studies, are not limited to access to basic education.<sup>225</sup> The fact that the SAHRC has not identified such issues despite having designated children's rights as a core thematic area of its work, reflects a degree of disconnect between the work the SAHRC undertakes and the reality of the context within which it operates.

In summary, despite the designation of migrant's rights as a focus area, the SAHRC's lack of a coherent approach to addressing these rights, particularly those of refugees and asylum seekers, presents a challenge to the effective promotion and protection of their rights. There is growing evidence that suggests that the use of specific strategies to advance the rights of migrants should include strategies using the minority-rights based approach to

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<sup>223</sup> SAHRC is *amicus curae* in the matter *Centre for Child Law and 25 Others v Minister of Education and 4 Others* that is before the Grahamstown High Court. The case deals with the right to education for undocumented learners and is set to be heard in September 2019. SAHRC, "SAHRC joins litigation on 'rights of education for undocumented learners,'" 3 July 2019, <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1999-sahrc-joins-litigation-on-rights-of-education-for-undocumented-learners>. See also André Gaum and Eden Esterhuizen, "Thousands of 'undocumented' children are being deprived of the basic right to education," accessed 18 November 2019 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.

<sup>224</sup> See for instance, Scalabrini Centre, *Foreign Children in Care: South Africa: A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa*, (Cape Town: Scalabrini Centre, July 2019); IOM, *Study on Unaccompanied Migrant Children in Mozambique, South Africa, Zambia and Zimbabwe*, (Pretoria: IOM, 2017); Lungile Magqibelo, Marcel Londt, Shiron September and Nicolette Roman, "Challenges Faced by Unaccompanied Minor-Refugees in South Africa," *Social Work* (Stellenbosch, Online) 52, no. 1, Issue 5 (2016): 70-89, <https://dx.doi.org/10.15270/52-1-480>; Ncumisa Willie and Popo Mfubu, "No Future for our Children: Challenges Faced by Foreign Minors Living in South Africa," *African Human Mobility Review* 2, no.1, Jan-April 2016. Ingrid Palmay, *For Better Implementation of Migrant Children's Rights in South Africa*, (UNICEF: Pretoria, 2009). The Department of Social Development held a colloquium in 2017 on unaccompanied and separated minors, which led to the establishment of a National Steering Committee on Unaccompanied and Separated Children. There is no reference to any NHRI in the proceedings or resolutions adopted thereafter. However, there was reference to the "need to find mechanisms to work with Non-Governmental Organisations (NGOs) which play an immensely important role," accessed 1 July 2020, <https://www.gov.za/speeches/social-development-colloquium-unaccompanied-and-undocumented-migrant-children-18-oct-2017>

<sup>225</sup> See references in note 225 above.



programming.<sup>226</sup> As discussed earlier, taking cognisant of an intersectional approach to programming, there is also a need to consider refugees and asylum seekers among groups already identified as particularly vulnerable to discrimination, violence and exploitation, such as persons with disabilities, older persons, women, children and sexual minorities.

## **6.6 NHRIs are invisible and are not prioritising the promotion and protection of refugee rights**

*“They need to be more visible”*<sup>227</sup>

The notion of invisibility varies depending on the context of its application, but its basic definition refers to the idea of “not being seen.” It abounds in refugee, forced migration literature, and refers primarily to the exclusion of refugees and asylum seekers or specific groups of refugees and asylum seekers from services, interventions, and even research studies. Within the context of migration, Gasper and Truong identified four categories of invisibility.<sup>228</sup> These were statistical invisibility, strategic invisibility, social invisibility, and institutional invisibility.

Statistical invisibility occurs when certain groups of migrants, such as women, children, and those with disabilities are not reflected in statistical data resulting in their exclusion from policy.<sup>229</sup> Strategic invisibility arises when migrants choose to avoid State

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<sup>226</sup> This approach proposes that refugees can be considered minorities within States in the same manner as indigenous persons and would thus require specific considerations to ensure their successful integration within their countries of asylum. One of its underlying principles is the promotion of the recognition of diversity. Stephanie E. Berry, *Mainstreaming a minority rights-based approach to refugee and migrant communities in Europe*, 2017. [https://minorityrights.org/wp-content/uploads/2017/12/MRG\\_Rep\\_MStream\\_CMC\\_FINAL.pdf](https://minorityrights.org/wp-content/uploads/2017/12/MRG_Rep_MStream_CMC_FINAL.pdf) (Accessed 8 September 2019); Stephanie E Berry, “Integrating Refugees: The Case for a Minority Rights Based Approach,” *International Journal of Refugee Law* 24, no.1 (February 2012): 1-36. <https://doi.org/10.1093/ijrl/eer038>.

<sup>227</sup> Interview with service provider participant 2, Johannesburg, South Africa.

<sup>228</sup> Des Gasper and Thanh-Dam Truong, “Women in Motion” in a World of Nation-States, Market Forces, and Gender Power Relations,” in *Migration, Gender and Social Justice: Perspectives on Human Insecurity* eds., Thanh-Dam Truong, Jeff Handmaker and Sylvia I. Bergh (Hexagon Series on Human and Environmental Security and Peace 9, (2014): 381. DOI 10.1007/978-3-642-28012-2\_21; See also Tara Polzer, “Invisible Integration: How Beauractic, Academic and Social Categories Obscure Integrated Refugees,” *Journal of Refugee Studies* 21, no. 4 (2008): 476-497. doi: 10. 1093/jrs/fen038.

<sup>229</sup> Des Gasper and Thanh-Dam Truong, “Women in Motion,” 381.

apparatus or limit social interactions because of the discrimination they may face.<sup>230</sup> Social invisibility refers to situations where migrants are outside the realm of recognition, for example their contribution to the economy, as informal economic activities is not recognised and they are not acknowledged as players within the economy.<sup>231</sup> Lastly, institutional invisibility results from migrants not having a formal status or having an unauthorised status and are, as a result, excluded from accessing services that would otherwise benefit them. One example includes the situation of undocumented minors being excluded from accessing basic education in South Africa in the absence of policy addressing their plight.

Various scholars also describe institutional visibility as the extent to which an institution “sees” refugees and asylum seekers. In this respect, to what extent do the institutional structures acknowledge refugees and asylum seekers through policy, norms, and programmes?<sup>232</sup> For instance, do local government policies acknowledge refugees and asylum seekers as recipients of social services? In the context of this study, do NHRIs acknowledge refugees and asylum seekers as a target population and do they systematically include them in their programmatic activities? Extending this further, are the institutions or organisations mandated to protect refugee rights “seen” within the structures or systems that advance refugee rights? Put differently, are the NHRIs visible within the refugee protection regime?

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<sup>230</sup> Des Gasper and Thanh-Dam Truong, “Women in Motion,” 381.

<sup>231</sup> Gasper and Truong, 381

<sup>232</sup> Francesca Meloni, Cecile Rousseau, Alexandra Ricard-Guay and Jill Hanley, “Invisible Students: Institutional Invisibility and Access to Education for Undocumented Children Invisible Students: Institutional Invisibility and Access to Education for Undocumented Children,” *International Journal of Migration, Health and Social Care* 13, no. 1 (March, 2017): 15-25, <https://doi.org/10.1108/IJMHS-01-2014-0001>; Raffaella Puggioni, “Refugees, Institutional Invisibility, and Self-Help Strategies: Evaluating Kurdish Experience in Rome,” *Journal of Refugee Studies* 18, Issue 3, September 2005, Pages 319–339, <https://doi.org/10.1093/refuge/fei034>; Jamie Winders, “Seeing Immigrants: Institutional Visibility and Immigrant Incorporation in New Immigrant Destinations,” *The Annals of the American Academy of Political and Social Science Vol. 641: Immigration and the Changing Social Fabric of American Cities* (May 2012): 58-78; Francesca Meloni, “Longing to Belong: Undocumented Youth, Institutional Invisibility, and Ambivalent Belonging in Canada,” in *The Immigrant Other: Lived Experiences in a Transnational World*, edited by Rich Furman, Greg Lamphear and Douglas Epps (New York: Columbia University Press: 2016): 240-252.

Polzer and Hammond point out that a critical reflection of invisibility requires careful consideration of “not only who or what is invisible, but invisible to whom, in what ways, and why.”<sup>233</sup> They assert that the “who” or “what” refers to the groups or processes that are part of the experience of displacement but are only identified as groups or issues of concern at a particular time, for instance refugees and asylum seekers who are sexual minorities have always existed, but focus on their plight is recent.<sup>234</sup> “Invisible to whom” they argue, focuses on the actors, where a particular group of refugees or asylum seekers may be visible to local CSOs, residents or local government actors but not to national or international actors.<sup>235</sup>

The question of “in what way” refers to categories applied to groups and situations and the functions those categories fulfil.<sup>236</sup> For example, the categorisation of displaced persons as IDPs (internally displaced persons) rather than citizens thus making them visible, including under international law, to various institutions, and demanding a different set of rules for responsibility. The question of “why” is about the process and politics of knowledge production, noting that “keeping something or someone invisible involves power: the power to decide who receives resources, who has the legitimacy to make their voices heard, or who can be harmed or ignored without consequences.”<sup>237</sup>

Therefore, the notion of invisibility is a complex and multi-layered issue and aspects of this complexity were reflected in the findings. However, a precise interrogation of the manifestation of invisibility within the refugee protection regime in South Africa is beyond

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<sup>233</sup> Tara Polzer and Laura Hammond, “Invisible Displacement,” *Journal of Refugee Studies* 21, no. 4 (2008): 417 (417-431), <https://doi.org/10.1093/jrs/fen045>

<sup>234</sup> Tara Polzer and Laura Hammond, “Invisible Displacement,” 417; Yiftach Millo, *Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel, and Kenya*, (HIAS: Nairobi, 2013); See also Elena Fiddian-Qasbiyeh “Invisible Refugees and/or Overlapping Refugeeedom? Protecting Sahrawis and Palestinians Displaced by the 2011 Libyan Uprising,” *International Journal of Refugee Law* 24, no. 2 (2012): 263–293, doi:10.1093/ijrl/ees027.

<sup>235</sup> Tara Polzer and Laura Hammond, 417

<sup>236</sup> Tara Polzer and Laura Hammond, 417

<sup>237</sup> Tara Polzer and Laura Hammond, 417-418

the scope of this thesis. Thus, the focus of the analysis will be based on the findings, and as such will not reflect on all the critical questions that Polzer and Hammond raise.

In terms of this study, the first three categories identified by Gasper and Truong are not relevant – except for statistical invisibility, aspects of which have been discussed in relation to disaggregation of data when reporting (see section 6.2 in this chapter). What is apparent from the findings is the notion of institutional invisibility, as described above and the answer to the question of “invisible to whom” posed by Polzer and Hammond. As the opening quote indicates, this study found that the three NHRIs, as institutional actors, are not visible within the refugee protection regime. Reiterating this notion, another participant stated: “Have they done submissions on these matters? I mean, I have seen LHR [Lawyers for Human Rights] making submissions, I’ve seen LRC [Legal Resource Centre] winning court cases and so on but I haven’t seen anything that the SAHRC has done.”<sup>238</sup>

Additionally, the findings indicate that the NHRIs are also not visible among the refugees as the refugee participants’ awareness about NHRIs was low. Those refugees, who were aware of the NHRIs, were primarily those in the employ of CSOs working with refugees and asylum seekers, as indicated in this statement by a refugee participant: “I got to know about the system here through my activism. I was also part of a project at the University of KwaZulu Natal that did some research which included these institutions, but it’s not often to hear about people going to them. I know one person, also a refugee who opened a case with the Public Protector, but they haven’t helped him at all.”<sup>239</sup>

As far back as 2006, service providers had been lamenting the SAHRC’s absence from within the communities and the detrimental impact that this has had on the awareness about refugee rights, both among refugees and asylum seekers and their host communities.<sup>240</sup>

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<sup>238</sup> Interview with service provider participant 3, Durban, South Africa.

<sup>239</sup> Interview with refugee participant 1, Durban, South Africa

<sup>240</sup> See pages 212-213 on CoRMSA’s review of the SAHRC’s role in CoRMSA, *Refugee Protection in South Africa*, 4.

From the interviews, it is apparent that the sentiments about the SAHRC's invisibility persist and that there is complete disengagement between the CSOs and refugees on the one hand with the Gender Commission and the Public Protector on the other hand.

Furthermore, from the findings, the SAHRC's institutional designation of refugee rights as priority rights has not translated to its visibility within the refugee protection regime. This is exacerbated by the fact that there is limited systematic and sustained reference to refugee rights in any of the NHRIs' reports or activities, except where required, for instance, during World Refugee Day commemorative activities (see discussion in section 6.4.1). This aspect of institutional invisibility is supported by the service provider and refugee participants' views that the NHRIs did not prioritise refugee rights in their work, as observed by one participant:

“On debates in parliament on the amendment of the Refugee Act, we haven't heard anything from them [NHRIs]. There is a new White Paper on the whole international migration policy; they want to overhaul the policy. We are asking ...I'm still to hear anything from their [NHRIs] side. So that's why I'm saying that if migrant issues is [are] a priority area, then they are weak and are unable to engage on the issue [s].”<sup>241</sup>

This finding contradicts one NHRI's perception of its prioritisation of refugee rights. The SAHRC participant stated that the institution prioritised refugee rights through the designation of migrants' rights/migration as a focus area. However, this contrasted with the Gender Commission's level of prioritisation of refugee rights in its activities as reported by the participant from the institution who stated: “I do not recall any recent work on refugees and there is currently no plan to do so. I think a report was done after the xenophobic violence erupted in KZN in Chatsworth in 2015, but I'll have to check with one of the Commissioners to see if any work will be done in this area in future.”<sup>242</sup>

The finding that NHRIs do not appear to prioritise refugee rights implies that the NHRIs are perhaps not accessible to this target population with implications for their

<sup>241</sup> Interview with service provider participant 6, Durban, South Africa.

<sup>242</sup> Interview with NHRI participant 3, Johannesburg, South Africa.

visibility as key actors for refugee rights promotion and protection. Carver emphasises the significance of accessibility in enhancing an NHRI's effectiveness, stating that:

“accessibility in all its dimensions is one of the most important determinants of NHRI effectiveness.”<sup>243</sup> This is supported by the Network of African NHRIs, which determined that African national human rights institutions' level of engagement with the general public was low and had a detrimental impact on their ability to raise awareness, educate and to receive complaints.<sup>244</sup>

Accessibility could also be through partnerships with CSOs.<sup>245</sup> However, the findings reflect that though partnerships exist, there is no clear strategy for maintaining these partnerships for instance, through already existing CSO networks that assist refugees and asylum seekers or among NHRIs through the forum of institutions supporting democracy. Participants raised questions about the value of the advisory committees that the SAHRC has in place yet, this could be an important channel for enhancing accessibility.

The context within which the NHRIs operate in was also raised as a possible reason for the perceived invisibility of NHRIs within the refugee protection space in South Africa. As discussed in section 6.3 in this chapter, the findings confirm that the socio-political context has imposed limitations on the NHRIs' capacities to effectively advocate for access to rights for refugees and asylum seekers and remedies where rights have been violated. This may have contributed to the impression that the SAHRC, the Gender Commission, and Public Protector are reluctant to engage meaningfully where refugee rights are concerned.

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<sup>243</sup> Richard Carver cited in Linos and Pegram, *Interrogating Form and Function*, 19.

<sup>244</sup> NANHRI, *Study on the State of NHRIs*, 72.

<sup>245</sup> NANHRI, *Study on the State of NHRIs*, 71.

## 6.7 Opportunities to strengthen NHRIs' for effective promotion and protection of refugee rights

All participants acknowledged that NHRIs had an important role to play within the refugee protection regime, and that there were opportunities available for the NHRIs to enhance their engagement with refugee rights. These include increasing NHRI institutional capacity, increasing visibility, enhancing relationships with CSOs and the UNHCR, and enhancing regional cooperation on asylum-related matters. While these are all important areas for enhancing NHRI effectiveness, these opportunities should be considered within the context that both internal and external factors, as the findings reflect, shape NHRI activities. Carver for instance stated: “it is certain that many NHRIs do not perform effectively, but this is more symptomatic of State failure to meet human rights obligations than an inherent problem with NHRIs.”<sup>246</sup> Rachel Murray drew a similar conclusion, stating:

“The research we have done indicates quite clearly that it is not one ... factor... alone that can render a NHRI effective, but a combination of them. Some are clearly the responsibility of a NHRI itself as to how it chooses to prioritise and organise its work, but a considerable impact on its effectiveness falls outside of its control.”<sup>247</sup>

This section discusses opportunities for strengthening NHRIs, bearing these perspectives in mind. In terms of NHRIs' need to increase institutional capacity to become more effective, one participant stated:

“Where is their plan as Chapter 9 institutions [NHRIs]? They don't seem to have a plan-at least the public doesn't feel the effect of their work. Look at how TAC [Treatment Action Campaign] took on the Department of Health to make anti-retroviral drugs available to HIV patients. That is what we want to see from Chapter 9 institutions.”<sup>248</sup>

This perception corresponds to conclusions drawn by Renshaw and FitzPatrick, Smith, Carver and Jensen, which have found that addressing institutional capacity, such as with

<sup>246</sup> Richard Carver, “A New Answer to an Old Question?” 31.

<sup>247</sup> Rachel Murray, “National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness,” *Netherlands Quarterly of Human Rights*, 25, no. 2, (June 2007): 220.

<sup>248</sup> Interview with service provider participant 6, Durban, South Africa.

respect to funding, human resource and technical skills on refugee or asylum law would enhance NHRIs' effectiveness.<sup>249</sup> As discussed in section 6.5 above, the SAHRC acknowledged that shortfalls in funding had limited the extent to which they could discharge their human rights mandate in general and this had an impact on addressing migrants' rights in general.

Addressing institutional capacity would have a bearing on NHRI's accessibility and visibility to the refugees, asylum seekers and other stakeholders, while addressing refugee rights would require use of specific strategies. For instance, the SAHRC could do this by ensuring that it monitors refugee rights through its designated role as the national preventive mechanism under OPCAT. This would not require a separate budgetary or human resource allocation. Rather, the SAHRC would be effectively utilising the opportunities presented by this designated role.

This argument is supported by Welch's findings, as highlighted in section 6.4.2 above, which determined that the NHRIs' ability to generate information about prevalence of torture had resulted in the decline of the use of torture by State apparatus.<sup>250</sup> Based on his findings, Welch concluded that: "Given that a top concern for NHRI effectiveness is budget constraints (...), investing in existing NHRIs to make them more capable of making international treaty obligations meaningful would be an effective strategy to improving respect for rights internationally."<sup>251</sup> Should NHRIs "mainstream" refugee rights within this oversight role, then perhaps they will be better placed to influence the extent to which implementation of refugee policies occurs in favour of refugees and asylum seekers.

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<sup>249</sup> Catherine Renshaw and Kieren Fitzpatrick, "National Human Rights Institutions, 150-180; Anne Smith, "The Unique Position of NHRI?" 904-946, International Council for Human Rights, *Assessing the Effectiveness*; Richard Carver, *Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework For Evaluation*, Bratislava: UNDP, 2014: 17-18; Steven L.B. Jensen, *Lessons from Research*.

<sup>250</sup> Ryan Welch, "National Human Rights Institutions, 96-116.

<sup>251</sup> Welch, "National Human Rights Institutions, 109.



Accessibility may also be enhanced through building comprehensive referral systems and increasing presence at community levels by building partnerships with local community organisations. This is linked to the suggestion that NHRIs enhance their relationship with CSOs as a means to enhance their engagement with refugee rights. This study found that the SAHRC and CGE have open working relationships with the CSOs, but that these networks needed to be strengthened for more substantive engagement to occur. Service provider participants reported that the lack of a formalised relationship resulted in an ad-hoc approach to interaction. Rarely did this amount to substantive and sustained engagement on a particular refugee rights issue, leading one participant to state: “Somebody said the only way to get the HRC [SAHRC] to fulfil its mandate would be to sue them, which would be quite an occasion.” Additionally, other participants provided the following responses reflecting their perceptions about the ad-hoc nature and weak substantive engagement between the NHRIs and CSOs:

“We do not have a formal working relationship...they contact us.”<sup>252</sup>

“We’ve met a number of times, but we focus on some advocacy activities for instance advocacy on World Refugee Day, SA Women’s Day, World AIDS Day and the 16 Days of Activism [against gender-based violence]. We bring [invite] them when doing [hosting] such events.”<sup>253</sup>

(Laughing) “No. They [SAHRC, CGE] never approach us. We invite them to our events.”<sup>254</sup>

In the case of the SAHRC, it has operationalised Section 11 of its Act, which gives it the authority to establish committees of expertise to provide technical guidance on the realisation of particular rights. The SAHRC has established a Section 11 Committee on Migration whose membership was drawn from the academia, CSOs working on refugee rights and international organisations including the UNHCR and the International Organisation for

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<sup>252</sup> Interview with service provider participant 4, Cape Town, South Africa.

<sup>253</sup> Interview with service provider participant 1, Durban, South Africa.

<sup>254</sup> Interview with service provider participant 6, Durban, South Africa.

Migration (IOM). However, it is not clear the extent to which this Committee has influenced the SAHRC's strategic work on refugee rights or even broadly, on migrants' rights, as at the time of writing, the Committee's work within the SAHRC had not been evaluated. Reports of the Committee's work, its terms of reference and other documents that would point to the essence of the strategic relationship are also not publicly available.

Few participants were aware of the Section 11 Committee as indicated by these responses: "No, I'm not aware of any. I have not heard of either the section 5 or Section 11 Committee on Migrants," and "No I'm not aware of such a Committee. It could be that it is because we are far removed from Johannesburg, but no, I've never heard of this Committee."<sup>255</sup> Nevertheless, the SAHRC has conducted joint activities with some of the Committee, members as highlighted below, that have had significant legal implications for refugee rights.

The Paris Principles underscore the importance of creating and maintaining relationships with CSOs. They recognise CSOs as an important constituency for NHRIs. They require NHRIs to "develop relations with the non-governmental organisations devoted to promoting and protecting human rights, ... as these organisations play a fundamental role in expanding the NHRI's work."<sup>256</sup> They emphasise the importance of forming partnerships with institutions that protect groups that are deemed particularly vulnerable including children, migrant workers, refugees, and physically and mentally disabled persons.<sup>257</sup>

The relationship between NHRIs and CSOs is symbiotic and would require a cost-benefit analysis to ensure that the focus remains one of achieving human rights ideals, without compromising both real and perceived independence and credibility issues.<sup>258</sup> Indeed,

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<sup>255</sup> Interview with service provider participant 1, Durban, South Africa and service provider participant 4, Cape Town, South Africa

<sup>256</sup> Paris Principles.

<sup>257</sup> Paris Principles.

<sup>258</sup> Catherine Shanahan Renshaw, "National Human Rights Institutions and Civil Society Organisations: New Dynamics of Engagement at Domestic, Regional and International Levels," *Global Governance* 18, no. 3 (July-

the SAHRC has acknowledged this stating: “While we have and will continue to work with NGOs, the approach we take is one of caution as the agendas and ideological approach that NGOs have may be very different from those of the SAHRC. The SAHRC is open to working partnerships with credible NGOs on a case-by-case basis and is justified by the prevailing interest on the matter of collaboration.”<sup>259</sup>

CSOs also offer an accessibility channel for NHRIs as they can extend the reach of NHRI services and facilitate information gathering.<sup>260</sup> Conversely, service provider participants noted that the NHRIs, especially the SAHRC, assisted with access to State authorities, which helped in providing traction for matters that would not have garnered meaningful responses, had the NHRI not been involved as one participant noted: “We’ve had doors to the DHA [Department of Home Affairs] opened simply because we brought the SAHRC along.”<sup>261</sup>

One example of a successful partnership between the SAHRC and the CSO was the SAHRC’s investigation into conditions of detention at the *Lindela* immigration detention facility. In 2012, a group of CSOs led by *Médecins sans Frontières* (MSF) lodged a complaint with the SAHRC about violations to the right of access to health for detainees at the *Lindela* Repatriation Centre.<sup>262</sup> The investigation was initiated through the Section 11 Committee, as three of the four complainants served as members of the Committee (Section 27, Lawyers for Human Rights and People against Suffering Oppression and Poverty (PASSOP)).<sup>263</sup> The investigation revealed that a number of detainees had either valid asylum seeker permits, expired asylum seeker permits, or expired refugee permits. The findings show

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Sept. 2012), 312.

<sup>259</sup> Ayebaesin Jacob Beredugo, “The Role and Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socio-Economic Rights,” LLD Thesis, University of Pretoria: Pretoria 2014, 222.

<sup>260</sup> Renshaw, “National Human Rights Institutions, 312.

<sup>261</sup> Interview with service provider participant 2, Johannesburg, South Africa.

<sup>262</sup> SAHRC, MSF, *Section 27, LHR & PASSOP v DHA, National Department of Health, Bosasa Operations (PTY) Ltd., SAPS & DIRCO*, GP 2012/0134 para 6.3,10; The SAHRC has conducted several investigations into conditions of detention at the Lindela facility but the DHA has ignored its recommendations.

<sup>263</sup> SAHRC v DHA, para 7.3.

that a high number of detainees were not aware that they could appeal their deportation orders.<sup>264</sup>

The SAHRC also found, inter alia, infringements of detainees' right to health care.<sup>265</sup> It recommended measures to enhance access to the facility for independent monitoring; improved access to information for detainees; improved access to health care; and ratification of relevant Conventions relating to migrants and the prevention of torture. The SAHRC undertakes a monthly monitoring of the facility and makes recommendations to address shortcomings should any be found. These recommendations are then discussed with the Department of Home Affairs on a quarterly basis.<sup>266</sup> These activities are implemented in tandem with the duties assigned to the SAHRC in *South African Human Rights Commission v Minister of Home Affairs*, as discussed above in section 6.4.2.

In addition, the findings indicate that the relationship between the UNHCR and the NHRIs is viewed as weak as some participants suggested that the NHRIs needed to enhance their relationship with the UNHCR. The findings further suggest that where such relationships exist, they were not consistent. For instance, the UNHCR on occasion conducts promotional activities with the SAHRC on refugee rights awareness but this is not the case with the CGE or the Public Protector. The activities that the UNHCR has conducted with the SAHRC included in October 2018, when the UNHCR and the SAHRC's Eastern Cape provincial office, held a workshop on the rights of refugees and asylum seekers and when the UNHCR and SAHRC partnered in the 2004 to implement an anti-xenophobia campaign, Roll Out Xenophobia. There was no evidence found that the UNHCR has conducted any activities with either the CGE or the Public Protector.

In addition, the service provider participants, who included staff from UNHCR's implementing partners, expressed reservations about UNHCR's role within the refugee

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<sup>264</sup> SAHRC v DHA, para 7.5.2, 7.5.3.

<sup>265</sup> SAHRC v DHA, 60.

<sup>266</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

protection regime, as stated by one participant: “I was very surprised when in Geneva I heard about UNHCR working with the KNCHR on a court case. As far as I am aware, that has never happened here in South Africa where UNHCR challenges a government position on refugee matters. The UNHCR is very silent here and prefers to tow the line.”<sup>267</sup>

Thus, there was very little evidence reflecting a substantive and sustained engagement between the SAHRC and the UNHCR, despite the UNHCR serving in the SAHRC’s advisory committee on migration and the SAHRC serving as a member of UNHCR’s Protection Working Group.<sup>268</sup> According to the UNHCR, the objective of the working group is “to prevent and respond to xenophobic attacks.”<sup>269</sup> The UNHCR adds that it has “put in place an early warning system to warn of imminent and possible outbreaks of violent attacks on persons of concern.”<sup>270</sup> It is not clear how this early warning system works to achieve its goal or how it influences SAHRC’s interventions though one participant stated that the SAHRC “actively” participates in the meetings” of the working group.<sup>271</sup>

However, despite the mechanisms in place, these do not seem to have prevented xenophobic violence from reoccurring. This study has also not found that the SAHRC reports on its activities related to the working group, nor has it identified the influence that activities within this working group has had on its work in relation to refugee rights. The evidence therefore supports the views that the relationship between the UNHCR needs to be strengthened.

This assertion is also supported by the results of a survey of NHRIs on their work on migrants’ rights, which determined that promoting and protecting migrants’ rights, including refugee rights, was a key component of the work of a significant number of NHRIs across the

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<sup>267</sup> Interview with service provider participant 1, Durban, South Africa

<sup>268</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

<sup>269</sup> UNHCR, *UNHCR Operation in South Africa, Lesotho and Swaziland Factsheet*, September 2015, 2, accessed 14 May, 2019, <https://www.unhcr.org/524d87689.pdf>.

<sup>270</sup> UNHCR, *UNHCR Operation in South Africa*, 2.

<sup>271</sup> Interview with NHRI participant 1, Johannesburg, South Africa.

globe.<sup>272</sup> Given these results, the UNHCR in its role as the custodian of the 1951 Refugee Convention, would thus be a natural partner for NHRIs. Therefore, the development of working methods with NHRIs would serve to enhance the partnerships at the domestic level.

Finally, cooperation among NHRIs at the regional level was pointed out as a possible avenue through which NHRIs could enhance the promotion and protection of refugee rights:

“There are opportunities that the sub-regional NHRI groupings present to address crosscutting issues related to refugees. This opportunity has not received much attention from the UNHCR. So we are now quite keen to identify good practices in thematic areas to encourage NHRIs to adopt common working methods.”<sup>273</sup>

Currently, the regional approach to promote and protect the rights of migrants is being advanced by the regional NHRI network through the Migration in Africa project.<sup>274</sup> This project specifically aims to facilitate African NHRIs’ promotion of the respect of refugee and migrant rights in transit camps.<sup>275</sup> While it is limited in scope in its current formulation, it may provide an opportunity for NHRIs to develop good practices for monitoring rights of refugees and asylum seekers in places of detention. This would be significant for those African NHRIs, such as the SAHRC, which are designated as monitoring mechanisms for torture prevention under the OPCAT.

The regional level also provides opportunities for refugee rights promotion and protection primarily through the African Commission.<sup>276</sup> As discussed in Chapter 3, NHRIs can fill the gap that exists due to the African Commission’s lack of a mechanism to follow up

<sup>272</sup> Andrea Kämpf, *NHRIs and their Work on Migrants*.

<sup>273</sup> Interview with service provider participant 5, Nairobi, Kenya; Andrea Kämpf, *NHRIs and their Work on Migrants*, According to the survey results, “most NHRIs believe that the effectiveness of their work on migrants’ rights could be increased through exchange and joint work: exchange among themselves and with other regional and inter- national institutions and joint monitoring of cross-border situations and cooperation on individual cases.”

<sup>274</sup> NANHRI, *Migration in Africa: Promoting Respect of Fundamental Rights for Refugees and Migrants in Transit Camps*, (Nairobi: NANHRI, 2018).

<sup>275</sup> NANHRI, *Migration in Africa*, 2018.

<sup>276</sup> Marina Sharpe, *The Regional Law of Refugee Protection in Africa*, (Oxford: Oxford University Press, 2018): 155-188, 205, 218: Marina Sharpe notes that the African Commission’s work on refugee issues occurs largely in isolation of the AU’s efforts and that it has failed to collaborate with other AU refugee related entities. These include: The Specialized Technical Committee (STC) on Migration, Refugees and IDPs, the Permanent Representatives’ Committee (PRC) Sub-Committee on Refugees, Returnees and IDPs, the Coordinating Committee on Forced Displacement and Humanitarian Action, the Divisions of Humanitarian Affairs, Refugees and Displaced Persons

on its recommendations and concluding observations. NHRIs can in a manner similar to that which they perform within the UN mechanisms and processes, with respect to State reporting, follow up on recommendations or concluding observations. Yet, despite having designated refugee rights as a thematic focus area, this study did not find any reference to the African Commission's recommendations, resolutions, or concluding observations on refugees or asylum seekers in the SAHRC's reports. Neither did the study identify any reference to the African Commission in the reports of the CGE or the Public Protector. In addition, none of the South African NHRIs included in this study referenced the African Commission's outcomes or statements specific to South Africa in their reports.

Furthermore, none of the SAHRC's reports reviewed for this study made any reference to its engagement with the NANHRI with respect to refugee rights. The SAHRC also publishes an annual international and regional human rights report (international report) but has not utilised the report to provide an analysis of its role as an NHRI within the regional human rights system. The international reports provide a useful reference for significant developments within the international and regional human rights systems but miss the opportunity for critical reflection of the SAHRC's role in influencing or contributing to the processes, especially those linked to its priority rights issues. The regional level was identified as an important avenue for engagement with refugee rights and provides important mechanisms and avenues for a robust engagement to occur. However, it is evident that the level of engagement is low and has not resulted in sustained collaboration that would develop a coherent approach to addressing refugee rights at the regional level.

## **6.8 Conclusion**

This chapter has discussed the main findings of this study in relation to the three primary NHRIs in South Africa. The findings reveal that the SAHRC is the most engaged with the promotion and protection of refugee rights, and that the Gender Commission and the Public

Protector implement ad-hoc activities. This study identified protection gaps stemming from the low level of engagement with refugee rights and internal and external institutional challenges. In the case of the SAHRC, despite its higher level of engagement with refugee rights, its engagement has varied across the years ranging from a perceived robust engagement to one that is perceived to be lacking in strategic direction. This was reflected in the perceptions that the SAHRC was invisible within the refugee protection regime, largely due to the absence of sustained or substantive engagement with other key stakeholders including the refugee and asylum seeker populations.

The discussion also highlighted pertinent protection gaps related to the gendered aspects of asylum for which the Gender Commission has a role to play and those resulting from corruption and maladministration that the Public Protector ought to address. It also revealed protection gaps with regard to refugee and asylum seeking children with respect to access to documentation and the resultant impact on the access to basic services. These protection gaps have led to the criticism that the NHRIs do not prioritise refugee rights and that there was need for NHRIs to build technical capacity on refugee rights. In addition, it was argued that the NHRIs ought to build stronger partnerships with CSOs, refugees and asylum seekers and the UNHCR, to promote accountability for the effective realisation of refugee rights. Furthermore, it was noted that the regional NHRI networks and other regional processes provided important avenues for the promotion and protection of refugee rights, and that this could be important sources of best practice.



## **Chapter 7**

### **NHRIs' engagement with the promotion and protection of refugee rights in Kenya**

#### **7.1 Introduction**

This chapter discusses and interprets the findings related to the NHRIs' engagement with the promotion and protection of refugee rights and focuses on the findings with respect to the NHRIs in Kenya. The chapter presents the thematic analysis of the findings in a similar sequence as discussed in chapter 6. Thus, the first section discusses the extent to which the three Kenyan NHRIs surveyed in this study have engaged with refugee rights. It then discusses the influence of the socio-political context on the degree to which NHRIs engage with refugee rights. This is followed by a discussion on the working methods that the NHRIs utilise to address refugee rights and subsequently a discussion on the challenges that impact on the NHRIs' effective engagement with refugee rights. The final section discusses the opportunities available to the NHRIs, which if taken up would enhance the NHRIs' engagement with refugee rights. The discussion of each of the six themes follows below.

#### **7.2 The extent to which NHRIs engage with refugee rights varies based on their mandate**

In Kenya, this study found that two NHRIs, the KNCHR and the National Gender and Equality Commission (Gender Commission) have dealt with matters related to refugees and asylum seekers. However, the findings highlight that the extent of engagement varied from a moderate degree of engagement to one that is minimal. There were no reports identified or findings made that indicated that the Commission on Administrative Justice has engaged with refugee-related matters. This finding contrasts to that in relation to the NHRIs in South Africa where this study found that the three NHRIs included, have had a degree of engagement with the promotion and protection of refugee rights. However, there is similarity with respect to

the NHRI, which has had the highest degree of engagement with advancing refugee rights. This would be the NHRI with the broadest human rights mandate.

Thus, the findings indicate that the KNCHR has played a more prominent role in advancing refugee rights than the Gender Commission and the Commission on Administrative Justice. This finding also corroborates literature that highlights that the NHRI with the broadest mandate tends to engage with refugee rights.<sup>1</sup> While the KNCHR's constitutional and legislative mandates do not explicitly provide for the promotion and protection of refugee rights, it has interpreted its broad mandate to include the promotion and protection of these rights.<sup>2</sup> This study found that the KNCHR's engagement with the promotion and protection of refugee rights in Kenya bears some similarities with that of the SAHRC.

For instance, the KNCHR has conducted activities related to migrants. It also handles individual complaints from refugees and asylum seekers. It has intervened, through public interest litigation, where the infringement of rights has had an impact on either the entire refugee and asylum seeker population or large portions thereof. In addition, the KNCHR also participated in the development of the Kenyan refugee protection framework resulting in the adoption of the Refugees Act of 2006. It also serves as part of the technical team overseeing the Act's amendment. It has a designated focus area on the rights of migrants, which includes the rights of refugees and asylum seekers.<sup>3</sup> However, the institutional support or mechanisms in place to guide this area of work differ from the SAHRC.

The KNCHR has a permanent staff member based within its Research Department, specifically tasked with reporting on migrants' rights including refugee rights. In addition, the KNCHR has on staff a Senior Legal Advisor seconded from the NGO, the International Development Law Organisation (IDLO). The Senior Legal Advisor has expertise in

<sup>1</sup> See Katerina Linos and Tom Pegram, "What Works in Human Rights Institutions?" 628-688.

<sup>2</sup> See KNCHR, <https://www.knchr.org/Our-Work/Special-Interest-Groups/Rights-of-Migrants>.

<sup>3</sup> Interview with NHRI participant 3, Nairobi, Kenya.

international refugee law and substantial experience litigating on refugee rights.<sup>4</sup> He assists with litigation on matters related to refugee rights and advises on policy positions and submissions or advisories that the KNCHR develops with respect to proposed legislation, policies or amendments to these. He also supports the KNCHR in its role within regional mechanisms addressing asylum in Eastern Africa. Thus, unlike the SAHRC, the KNCHR has a better human resource and institutional base to support its work on refugee rights.

In terms of the Kenyan Gender Commission, its mandate is similar to the South African Gender Commission. It focuses on promoting equality and prevention of discrimination on the basis of gender. However, based on the findings, its role within the refugee protection regime has been minimal. Most participants reported not to have interacted with the Gender Commission. Only one participant, a service provider, recalled a Gender Commission representative in attendance in a workshop and one instance where it was involved in consultations with the UNHCR.<sup>5</sup> This study did not identify any instance where the institution had initiated any refugee or asylum seeker related initiatives.<sup>6</sup> There was also no evidence to indicate that it had handled a refugee rights' related complaint. Interestingly, its current Chief Executive Officer (CEO), who was appointed in February 2018, has extensive professional experience in refugee protection and he served as the Acting Commissioner for Refugees in the national immigration department.<sup>7</sup> His appointment may perhaps influence a strategic role for the Gender Commission within the Kenyan refugee protection regime. This is critical as the challenges with respect to addressing the gendered aspects of asylum equally apply within the Kenyan context.

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<sup>4</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>5</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>6</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>7</sup> National Gender and Equality Commission, *Annual Report 2017/2018*, 59, accessed 9 September, 2019. <https://www.ngeckkenya.org/Downloads/NGEC%20Annual%20Report%202017-2018.pdf>.

Hoassain et al, and Bartolomei et al have found that refugee and asylum seeking women and children face high levels of sexual and gender based violence in Kenya.<sup>8</sup> Millo and Breen and Millo also determined that those refugees and asylum seekers who are sexual minorities are particularly vulnerable to high levels of sexual and gender based violence in Kenya.<sup>9</sup> This study found a dearth in literature on the gendered aspects of asylum in Kenya, either in terms of policies, laws and their implementation, or access to rights for refugee and asylum seeking women, children and sexual minorities.<sup>10</sup> There was also an absence in empirical studies on the role of NHRIs in promoting and protecting gender equality generally and specifically within the asylum process.

As is the case for the South African Gender Commission, there is an opportunity for the Kenyan Gender Commission to strategically engage with the refugee protection regime given the gap that exists both in terms of addressing protection needs of refugee and asylum seeking women, children and sexual minorities and the development and implementation of relevant laws and policies. Increasingly, NHRIs are implementing activities focused on marginalised groups including refugee women and sexual minorities and are, as a result, contributing to the realisation of rights for women and other minorities and marginalised

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<sup>8</sup> Mazed Hossain, Chimaraoke Izugbara, Alys McAlpine, Stella Muthuri, Loraine Bacchus, Sheru Muuo, Anjalee Kohli, Carolyn Egesa, Rachel Pearson, Giorgia Franchi, Mairi MacRae, *Violence, Uncertainty, and Resilience among Refugee Women and Community Workers: An Evaluation of Gender-based Violence Case Management Services in the Dadaab Refugee Camps* (London: Department for International Development (DFID), 2018), <https://www.whatworks.co.za/documents/publications/177-what-works-dadaab-report-lowres/file>; Linda Bartolomei, Eileen Pittaway and Emma Elizabeth Pittaway, "Who Am I? Identity and citizenship in Kakuma refugee camp in northern Kenya," *Development*, 46, no.3 (September 2003): 87–93. <https://doi-org.ezproxy.uct.ac.za/10.1177/10116370030463014>; Human Rights Watch, *Seeking Refugee, Finding Terror: The Widespread Rape of Somali Women Refugees in North-eastern Kenya* (New York: Human Rights Watch; 1993).

<sup>9</sup> Yiftach Millo, "Identity and Integration in Israel and Kenya," *Sexual Orientation and Gender Identity and the Protection of Forced Migrants, Forced Migration Review*, no. 42(April 2013): 52-53; Duncan Breen and Yiftach Millo, "Protection in the City: Some 'good Practice in Nairobi," *Sexual Orientation and Gender Identity and the Protection of Forced Migrants, Forced Migration Review*, no. 42(April 2013): 54-56; Human Rights First, *The Road to Safety: Strengthening Protection for LGBTI Refugees in Uganda and Kenya*, 2012, accessed 3 September 2019, [https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The\\_Road\\_to\\_Safety.pdf](https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The_Road_to_Safety.pdf).

<sup>10</sup> An evaluation of the transition process of the refugee status determination process from UNHCR to the Kenyan Government (DRA) noted this gap and recommended that gender and diversity be mainstreamed into the government-led RSD process. Madeline Garlick, Elspeth Guild, Machiel Salomons, *Formative Evaluation of the RSD Transition process in Kenya: Summary of Selected Points Discussed at Meetings of the Steering Committee*, (Geneva: UNHCR, 2015).

groups.<sup>11</sup> Their role in this regard is vital in influencing the adoption and implementation of international norms in national policies with respect to the gendered aspects of asylum. As Freedman notes:

The degree of national action and mobilisation around the issue of gender specific persecution and the right to asylum has clearly had a major impact on persuading national authorities to adopt and implement international norms and conventions. The degree and impact of these national mobilisations have been dependent both on political opportunity structures in each national context and on discursive opportunity structures or the degree of domestic salience of these international norms.<sup>12</sup>

In the absence of a high degree of engagement with the gendered aspects of asylum, the level of impact that actors such as the Gender Commission can have within the refugee protection regime is minimal. Indeed, none of the participants in Kenya mentioned the gendered aspects of asylum within the refugee protection regime. Neither was reference made to whether NHRIs ought to pay particular attention to such issues. However, as highlighted in chapter 5, the sample size for this study was small and cannot be deemed as representative, and these issues may already be high within the refugee protection agenda, except for the lack of engagement by national institutions.<sup>13</sup>

With respect to the Commission on Administrative Justice, this study found that it is absent from the asylum discourse in Kenya.<sup>14</sup> There was no evidence identified to indicate that the Commission on Administrative Justice had investigated or conducted any activities related to refugee rights or the management of asylum. In addition, a review of literature on the Commission on Administrative Justice showed a considerable gap in the analysis of its role within the context of the promotion and protection of human rights, regardless of the

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<sup>11</sup> GANHRI, Preventing and Eliminating All Forms of Violence Against Women and Girls: The Role of National Human Rights Institutions A Contribution to the Review and Priority Themes of CSW63, Geneva: GANHRI, 2019, 26

[https://nhri.ohchr.org/EN/Documents/DIMR\\_GANHRI%20CSW%20Report\\_final%20BF.pdf](https://nhri.ohchr.org/EN/Documents/DIMR_GANHRI%20CSW%20Report_final%20BF.pdf);

<sup>12</sup> Jane Freedman, “Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?” *International Migration* 48, no.1 (2010): 185-186.

<sup>13</sup> See notes 8 and 9 above.

<sup>14</sup> None of the CAJ’s reports reviewed for this study made any reference to refugees or asylum seekers.

category of rights. Furthermore, none of the participants reported any form of interaction with this institution nor were they aware of any activities that it had engaged in with respect to the promotion and protection of the refugee rights, as reflected by these statements:

No, I didn't know that there were such institutions here to assist people like us.<sup>15</sup>

I don't recall the CAJ [Commission on Administrative Justice] or Gender getting involved in any of these matters, only the Human Rights Commission.<sup>16</sup>

No, we haven't done any work with the CAJ on refugee matters.<sup>17</sup>

The Commission on Administrative Justice's mandate requires that it addresses issues related to maladministration where public institutions and persons holding public office are concerned. Section 8(k) of its enabling Act grants the Commission the authority to "take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration."<sup>18</sup> It is, therefore, conferred with the authority to address maladministration within the asylum regime in Kenya.

The discussion in chapter 4 identified administrative issues within the Kenyan asylum regime as one of the key challenges impeding the effective realisation of refugee rights. Carver and Gammeltoft-Hansen have argued that Ombudsman institutions can play an important role where refugee matters are concerned.<sup>19</sup> Furthermore, Devenish *et al.* identified maladministration within asylum regimes as one of the primary factors that contributed to

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<sup>15</sup> Interview with refugee participant 7, Nairobi, Kenya

<sup>16</sup> Interview with service provider participant 7, Nairobi, Kenya

<sup>17</sup> Interview with NHRI participant 3, Nairobi, Kenya

<sup>18</sup> Commission on Administrative Justice Act, Section 8(k)

<sup>19</sup> Richard Carver, "NHRIs and Refugees"; Hans Gammeltoft-Hansen, "Refugee Concerns" in *The Ombudsman Concept*, in *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* ed., Linda Reif (The Hague: Kluwer Law International, 1999); Hans Gammeltoft-Hansen, "Asylum-seekers, Refugees and the Danish Ombudsman" in *The Living Law of Nations* eds., G. Alfredsson and P. Macalister-Smith (Kehl: N.P. Engel, 1996).

human rights violations faced by refugees and asylum seekers in Africa.<sup>20</sup> They suggested specific ways through which Ombudsman institutions could protect the rights of refugees, asylum seekers including by challenging administrative injustice that refugees and asylum seekers face because of maladministration and corruption. Thus, the Commission's failure to address manifestations of maladministration within the refugee protection regime, affects the degree of accountability that could be demanded from the government.

### **7.3 The socio-political context undermines the extent to which the NHRIs can effectively advance refugee rights**

The socio-political context in Kenya was also found to have a negative impact on the extent to which the NHRIs can effectively advance refugee rights. Similar factors to those identified within the South African context were found to have an impact on the capacity of the NHRIs in Kenya to effectively engage with refugee protection. These were: the securitisation of asylum, xenophobia, and the lack of political will to promote the effective implementation of the domestic refugee protection framework.

In terms of securitisation of asylum, the situation for the KNCHR differs markedly with that of the SAHRC. Whereas the SAHRC does not face pressure from the government and the national assembly to desist from engaging with refugee-related matters, the KNCHR does - as reflected in the following statement by the NHRI participant: "Securitisation has made it difficult to have any meaningful dialogue with the government [and it] has become very abrasive about refugee matters. That's really not encouraging for any of us working on human rights. We are seen as the enemy for intervening on behalf of foreigners."<sup>21</sup> Service provider and NHRI participants reported that matters relating to asylum were now considered to fall strictly within the purview of institutions and government departments that fall within

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<sup>20</sup> Annie Devenish, Arlene Brock, Franky Lwelela and Marion Adonis, "The Role of the Ombudsman in Protecting the Rights of Refugees, Asylum Seekers and Internally Displaced Persons," *Best Practice Brief*, no.2 (October, 2019): 3-7.

<sup>21</sup> Interview with NHRI participant 3, Nairobi, Kenya.

the security cluster.<sup>22</sup> Garlick et al, Kiama and Karanja, Maina and the UNHCR have also concluded that the Kenyan government views asylum matters as national security concerns.<sup>23</sup> Consequently, government officials routinely discourage institutions such as the KNCHR from intervening or participating in asylum matters.<sup>24</sup> According to the KNCHR participant, this has become more evident under the current presidency, resulting in the government “compromising the refugee space.”<sup>25</sup>

The NHRI participant reported that the KNCHR experiences hostility from the government when it engages with asylum related matters.<sup>26</sup> In particular, the participant opined that its protection role in relation to refugees and asylum seekers had been limited as a direct result of the securitisation of the asylum space in Kenya. For instance, the KNCHR is now required to refer all complaints pertaining to refugees and asylum seekers to the Refugee Affairs Secretariat.<sup>27</sup> The NHRI participant noted that “the RAS [Refugee Affairs Secretariat] is still in a transitional phase, it is staffed with former intelligence or security officers, and is

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<sup>22</sup> The security cluster (National Security Council s240 (2) of Constitution) includes the President, Deputy President, the Minister for Interior and Coordination of National Security (referred in brief as the Minister for Internal Security), the Minister for Defence and the Chief of the Defence Forces, Minister for Foreign Affairs, the Attorney General, Director General of the National Intelligence Service and the Inspector-General of the National Police Service. Interview with NHRI participant 3 and service provider participant 5 and 7, Nairobi, Kenya:

<sup>23</sup> See also Madeline Garlick, Elspeth Guild, Caitlin Procter and Machiel Salomons, *Formative Evaluation* para 211); UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report-Universal Periodic Review: KENYA*; Lucy Kiama and Rufus Karanja, “Asylum space in Kenya: evolution of refugee protection over 20 years,” *Forced Migration Review-25<sup>th</sup> Anniversary Collection*, November 2012 <https://www.fmreview.org/25th-anniversary/kiama-karanja>; Andrew Maina, “Securitization of Kenya’s Asylum Space: Origin and Legal Analysis of the Encampment Policy,” in *Refugees and Forced Migration in the Horn and Eastern Africa: Trends, Challenges and Opportunities*, eds. Johannes Dragsbaek Schmidt, Leah Kimathi, Michael Omondi Owiso (Switzerland: Springer, 2019): 88-89. See also discussion in Chapter 4 of this thesis.

<sup>24</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>25</sup> Interview with participant 3, Nairobi, Kenya.

<sup>26</sup> Interview with participant 3, Nairobi, Kenya. The review of the Refugees Act of 2006 began following the promulgation of Kenya’s new Constitution in 2010. The Kenyan Parliament signed the amended legislation, the Refugees Bill, in 2016. However, the Kenyan President declined to sign the bill into law and referred it back to Parliament citing in adequate public consultations. See *Business Daily*, “Uhuru rejects bill giving refugees right to jobs and land,” *Business Daily*, 8 November 2017, <https://www.businessdailyafrica.com/economy/Uhuru-rejects-bill-giving-refugees-right-to-jobs-and-land/3946234-4178936-xf36adz/index.html>.

<sup>27</sup> This is the government agency tasked with the overall administration, coordination and management of all asylum matters, formerly the UNHCR’s role. It is a unit operating within the Ministry of Internal Security



poorly resourced.”<sup>28</sup> The recruitment of staff with security or intelligence backgrounds certainly augments the Kenyan government’s efforts to ensure that refugee management retains its securitised nature. It serves to undermine the civilian nature of refugee protection.<sup>29</sup> Even though the NHRI participant was explicit about the problematic nature of security and intelligence officers managing refugees and asylum seekers, this study did not identify any public criticism of this recruitment process, with the exception of the implied unease with their formal presence within the asylum space.<sup>30</sup>

Some of the challenges that the Refugee Affairs Secretariat faces were highlighted in a UNHCR evaluation of the refugee administration transition process and are corroborated by a study conducted on access to documentation for urban refugees. These assessments found that the secretariat faced considerable challenges in carrying out its mandate.<sup>31</sup> The NHRI participant thus viewed the Refugee Affairs Secretariat as a weak structure, which may likely not be fully operationalized given the government’s negative stance on refugees and asylum seekers in Kenya. This has made it difficult for the KNCHR to provide optimal legal assistance to refugees and asylum seekers, as the KNCHR is required to make referrals to an institution that it has determined “lacks the capacity and capability to provide the requisite assistance to refugee or asylum seeker complainants.”<sup>32</sup>

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<sup>28</sup> Various reports confirm the KNCHR’s assertions that the RAS is staffed by former security and intelligence officers see in Sorcha O’Callaghan and Georgina Sturge, “Against all Odds: Refugee Integration in Kenya,” Its capacity constraints are also well documented. See Madeline Garlick, Elspeth Guild, Caitlin Procter and Machiel Salomons, *Formative Evaluation*; Hargraves, Karen, Sara Pantuliano, and Idris Ahmed, *Closing Borders: The Ripple Effect of Australian and European and Refugee Policy: Case Studies from Indonesia, Kenya and Jordan*, HPG Working Paper (September 2016), accessed 9 June 2019, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10862.pdf>; Anna Lindley, “Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya,” *Refugee Survey Quarterly*, (2011): 8-9, DOI:10.1093/rsq/hdr013

<sup>29</sup> Rufus Karanja, “The Blurred Line: Preserving the Asylum Space in the Context of Increasing Insecurity,” *Refugee Insights*, no. 25 (2014).

<sup>30</sup> Sorcha O’Callaghan and Georgina Sturge, “Against all Odds” 5. Interview with participant.

<sup>31</sup> NRC, IHRC. *Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status*, November 2017, accessed 22 May 2018, [http://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees\\_nrc\\_ihrc\\_november2017\\_embargoed.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees_nrc_ihrc_november2017_embargoed.pdf); Madeline Garlick, Elspeth Guild and Machiel Salomons, *Formative Evaluation*.

<sup>32</sup> Interview with NHRI participant 3, Nairobi, Kenya.

However, in an attempt to bridge this protection gap, and despite the existence of the referral system, the KNCHR continues to investigate complaints from refugees and asylum seekers where it deems a human right has been violated. Where a referral is necessary, the KNCHR ensures that the complainant receives guidance on the process to have the matter resolved and follows up with the complainant. It has also adopted a strategic approach to complaints handling by focusing on those complaints or violations that can be resolved through public interest litigation, challenging in particular, the constitutionality of State action or inaction. Furthermore, the KNCHR increased its promotional activities in urban areas where refugees and asylum seekers reside in large numbers. These activities are discussed in sections 7.4.1 and 7.4.2 below.

Despite the pressure to disengage from dealing with the promotion and protection of refugee rights, the KNCHR's activities, alluded to above, indicate a determination to fulfil its mandate, though evidence shows that the costs to the KNCHR have been high. This is not only due to its continued engagement with asylum matters, but also because of its perceived effectiveness in implementing its human rights mandate in general.<sup>33</sup> Its effectiveness in demanding accountability has led to both overt and covert efforts by the government to weaken it institutionally. Such efforts range from members of parliament calling for the KNCHR's dissolution, delays in the appointment of commissioners once terms of offices end, the reduction of the institution's budget and the pressure to desist from engaging with certain human rights.<sup>34</sup> For instance, the KNCHR's operational budget had been cut so severely that

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<sup>33</sup> KNCHR ranks among its peers as a strong and independent NHRI. KNCHR has been consistently accredited with the A status, that is being fully compliant with the Paris Principles since its first accreditation application in 2005. Its work in relation to the Universal Periodic Review has been cited as best practice. So too has its work in relation to human rights accountability during elections and the promotion and protection of the rights of other persons of concern to the UNHCR, i.e., internally displaced persons (which contributed to the development of the UNHCR Checklist for working with NHRIs in context of internal displacement) and stateless persons. See also its own reflections in the report KNCHR, *It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights, July 2003-August 2011* (Nairobi: KNCHR, 2012), [https://www.knchr.org/Portals/0/GeneralReports/Its\\_Hard\\_to\\_be\\_Good.pdf?ver=2013-02-21-152535-707](https://www.knchr.org/Portals/0/GeneralReports/Its_Hard_to_be_Good.pdf?ver=2013-02-21-152535-707).

<sup>34</sup> NANHRI, *Mapping Survey of Complaints Handling*; See for instance KNCHR's investigations into allegations torture, arbitrary arrests and extra-judicial killings in anti-terror operation where Commissioners and staff

it has little room to implement programmes as confirmed by the KNCHR participant: “Our budget has also been seriously cut and there is reluctance to provide the necessary funding to ensure that programmes run.”<sup>35</sup> A service provider participant added: “The KNCHR has been forced to spend valuable time pursuing donor funding, which means a considerable amount of their limited resources are spent on developing proposals and not on actual programme work.”<sup>36</sup>

The KNCHR also opined that the creation of other State institutions has led to an erosion of its broad human rights mandate. For example, the KNCHR handled complaints, including from refugees and asylum seekers, which related to police abuses such as harassment, arbitrary arrests, extortion, and bribery.<sup>37</sup> This function was taken over by the Independent Police Oversight Authority (IPOA), which was established in 2011.<sup>38</sup> The KNCHR stated that, as a result, it is required to refer all complaints it receives relating to police misconduct to the IPOA, whose staff do not necessarily have experience with human rights.<sup>39</sup> This is problematic as research on challenges that urban refugees and asylum seekers face in Kenya has shown that the police constitute one of the primary violators of their

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received threats: Peace Loise Mbae, “KNCHR Report: 25 killed, 81 Missing in Anti-terror Operation,” *Standard Digital*, 15 September, 2015 <https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation>; KHRC, *Let's We Forget: The Faces of Impunity in Kenya* (Nairobi: KHRC, 2011). <https://www.khrc.or.ke/publications/30-let-we-forget-the-faces-of-impunity-in-kenya/file.html>; KNCHR, *It's Hard to be Good*.

<sup>35</sup> Financial constraints because of low funding levels from the Kenyan government have been cited as a primary challenge that the KNCHR faces. See KNCHR, *It's Hard to be Good*; Bonolo Ramadi Dinokopila and Rhoda Igweta Murangiri, “The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation,” *African Journal of International and Comparative Law* 26, no. 2 (2018): 224-225, (<https://doi.org/10.3366/ajicl.2018.0228>); Also confirmed in the interview with service provider participant 5, Nairobi, Kenya.

<sup>36</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>37</sup> See for instance KNCHR, *The Error of Fighting Terror with Terror* (Nairobi: KNCHR, 2015). <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/The%20Error%20of%20Fighting%20Terror%20With%20Terror.pdf?ver=2018-06-06-200137-237>.

<sup>38</sup> Kenya Gazette, *Independence Policing Oversight Authority Act*, 2011; The IPOA provides civilian oversight over the work of the police. Its functions are set out in s 6 of the Act and include investigating police action, which results in deaths and serious injuries.

<sup>39</sup> See training for IPOA staff on human rights, IPOA, “IPOA Board undergoes human rights training,” *IPOA*, accessed 25 August, 2019, <https://www.ipoa.go.ke/ipoa-board-undergoes-human-rights-training/>

rights.<sup>40</sup> In addition, the anti-terror interventions carried out by the Kenyan police have mostly targeted Kenyan Somalis and refugees and asylum seekers of Somali origin.<sup>41</sup>

There is little evidence to show the existence of a working relationship between the KNCHR and IPOA that would point to an attempt to fill any protection gaps that may have resulted following the creation of the IPOA.<sup>42</sup> In the absence of clarity over the roles, the KNCHR continues to investigate allegations against police action on the basis of its founding legislation and Article 238 (2) of the Constitution, which provides that “national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.”<sup>43</sup>

Linos and Pegram found that many NHRIs have been dismantled or undermined precisely because they were too effective in fulfilling their mandates.<sup>44</sup> These findings corroborate the KNCHR’s experiences in the promotion and protection of refugee rights. In spite of this, the KNCHR has, in the face of a challenging socio-political context, found ways to adapt, to ensure that it complies with its mandate with respect to refugee rights. However, its capacity to continue addressing the challenges may be further curtailed, in the context of the State’s restrictive actions to circumvent protection of refugee rights. The Kenyan government has displayed a willingness to adapt to ensure that its objective to maintain a securitised asylum space is realised. For instance, the KNCHR’s recent litigation successes in

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<sup>40</sup> Elizabeth H Campbell, “Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration,” *Journal of Refugee Studies* 19, no. 3 (September 2006): 396–413, <https://doi.org/10.1093/jrs/fel011>; UNHCR, *Navigating Nairobi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in Kenya’s Capital* (Geneva: UNHCR, 2011); NRC, IHRC, *Recognising Nairobi’s Refugees*; Carrie Hough, “Newcomers to Nairobi: The Protection Concerns and Survival Strategies of Asylum Seekers in Kenya’s Capital City,” *New Issues in Refugee Research*, no. 260 (2013).

<sup>41</sup> For instance, Operation *Usalama Watch*, the Kenyan governments security response to the terrorists attack. The KNCHR documented serious human rights violations perpetrated against Somalis-both Kenyans and refugees and asylum seekers-by the police.

<sup>42</sup> The IPOA Act provides in s 8(c) that the Chairperson of the Kenya National Human Rights and Equality Commission shall be an *ex-officio* member of the IPOA’s governing authority. While the Kenyan Constitution provides for the establishment of the Kenya National Human Rights and Equality commission does not exist, Parliament in terms of Article 59 of the Kenyan Constitution opted to split the KNHREC into 3 separate institutions, that is, the KNCHR, the NGEC and the CAJ.

<sup>43</sup> Laws of Kenya, *Constitution of Kenya 2010*.

<sup>44</sup> Katerina Linos and Tom Pegram. *Interrogating Form and Function*, 6.

challenging the government's policy that contravened refugee and asylum seekers' rights rested on the issuance of government directives. According to the KNCHR, the Kenyan government has now resorted to using *note verbales* to demand changes in the implementation of the asylum policy, thus making it difficult for KNCHR and other actors to seek remedies through the courts.<sup>45</sup>

Additionally, Andrew Maina argues that the Kenyan judicial space is also becoming securitised based on subsequent rulings in favour of the encampment policy.<sup>46</sup> In *Samow & Others v Cabinet Secretary & Others*<sup>47</sup> and *Coalition for Reform and Democracy (CORD) & 2 Others v Attorney General & Republic of Kenya & 10 Others*,<sup>48</sup> the courts found that the encampment policy was justified on the basis of national security without the State having provided proof of the existence of the connection between the presence of refugees and asylum seekers with heightened threats to national security.<sup>49</sup>

As discussed in chapter six, securitisation has been identified as one of the factors contributing to xenophobic attitudes towards refugees and asylum seekers.<sup>50</sup> This study found that xenophobia is also manifested within the asylum space in Kenya. However, unlike the South African context, xenophobia is not an integral asylum experience for all refugees and asylum seekers in Kenya.<sup>51</sup> In Kenya, xenophobic attitudes are primarily targeted at ethnic Somali refugees and asylum seekers [and Kenyan Somalis]. Thus, the KNCHR deals primarily with violations of rights concerning Somali refugees and asylum seekers usually because of police action directed at them because of their ethnicity or perceived

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<sup>45</sup> *Note verbales* are governed under diplomatic law as they are a form of diplomatic communication and are subject to immunities.

<sup>46</sup> Andrew Maina, "Securitization of Kenya's Asylum Space," 88-89.

<sup>47</sup> *Samow & Others v Cabinet Secretary & Others* (eKLR, 2014)

<sup>48</sup> *Coalition for Reform and Democracy (CORD) & 2 Others v Attorney General & Republic of Kenya & 10 Others* (eKLR, 2015.)

<sup>49</sup> Andrew Maina, "Securitization of Kenya's Asylum Space," 88-89.

<sup>50</sup> See discussion in chapter 6 section 6.3.

<sup>51</sup> UNHCR, *Submission to UPR-Kenya*, 5-6.

“foreignness.”<sup>52</sup>

The KNCHR’s litigation has also focused on the protection of the rights of Somali refugees and asylum seekers, as have its promotional activities. For instance, the KNCHR created a human rights desk in a Nairobi suburb with a high urban Somali refugee and asylum seeker population, precisely due to their vulnerabilities to discrimination, arbitrary arrests, and unlawful detention.<sup>53</sup> It also hosts regular legal clinics at the site and provides both free legal advice and referral services to other service providers competent to handle their concerns. The findings also revealed that there was the perception that xenophobic attitudes towards Somalis in general were deeply embedded among policy-makers, politicians, and civil servants.<sup>54</sup>

The xenophobic attitudes coupled with the drive for a securitised asylum space had led to the perception that the Kenyan government lacked the political will to promote the effective implementation of the domestic protection regime. The notion of political will, as discussed in chapter 6, implies that both the State and the NHRIs have the authority and must be willing to put in place adequate structures and resources to cause change within the refugee protection regime. Additionally, there are key elements that need to be considered when discussing political will. These are “willingness”, “capacity”, “authority”, and “reform”.<sup>55</sup> As such, political will is dependent upon the willingness of an actor who has the

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<sup>52</sup> KNCHR, *Return of the Gulag*; UNHCR, *Submission to UPR-Kenya*, 6, UNHCR, *UNHCR seeking access to detained asylum-seekers and refugees in Nairobi*, 7 April 2014, accessed 8 September, 2019, <https://www.unhcr.org/5342b35d9.html>; Amnesty International, Kenya: *Crackdown on irregular migrants risks sparking xenophobia*, 1 September 2018, accessed 2018, <https://www.amnesty.org/en/latest/news/2018/09/kenya-crackdown-on-irregular-migrants-risks-sparking-xenophobia/>; Sara Pavanello, Samir Elhawary and Sara Pantuliano, “Hidden and Exposed.”

<sup>53</sup> Operation *Usalama Watch*; While studies show that other groups or urban refugees and asylum seekers in Kenya are also at risk of unlawful detention and arbitrary arrests, the Somali ethnic group are most often the victims.

<sup>54</sup> KNCHR, *Out of the Shadows: Towards ensuring the Rights of Stateless Persons and those at Risk of Statelessness in Kenya* (Nairobi: KNCHR, 2010), 9-10, <https://www.unhcr.org/4e8338d49.pdf>; KNCHR, *An Identity Crisis?: A Study on the Issuance of National Identity Cards in Kenya*, (Nairobi: KNCHR, 2007) <http://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf>.

<sup>55</sup> Lori Ann Post et al, “Defining Political Will,” 654-659.

capacity and authority to bring about change or reform.<sup>56</sup>

This study found that there was consensus among all the participants that effective implementation of the domestic refugee protection regime required reform. Further, that the NHRIs' capacity to influence the necessary reform rested on the government's willingness to fully commit to realising refugee rights in accordance with its international obligations. Additionally, that the NHRI must also be willing to commit to utilising its resources to effect change.

In terms of capacity, the KNCHR viewed the delays in fully operationalizing the Refugee Affairs Secretariat, as deliberate State action to undermine the refugee regime, as reflected in this statement:

RAS [Refugee Affairs Secretariat] is not fully staffed. It is still not clear if the RAS has deployed staff to all its sites including in the refugee camps. It's also not coincidental that the RAS staff includes former intelligence and security officers. I have little confidence that they will view the asylum process through a humanitarian lens. The agenda is securitisation of asylum and the government will invest resources in that, not in protecting the rights of foreign nationals.<sup>57</sup>

The KNCHR's view is that the Refugee Affairs Secretariat's inadequacies had made it difficult to meet the protection needs of refugees and asylum seekers. Also, that the poor functioning of the entity tasked with managing asylum was an illustration of the lack of political will on the part of the government to ensure that refugees and asylum seekers were protected. The KNCHR thus finds itself in a difficult situation. On the one hand, it is required to refer refugee and asylum seeker complaints to the Refugee Affairs Secretariat, but on the other hand, it risks compromising its own mandate by referring complaints to an entity that may not have the capacity to offer the protection required. The KNCHR interprets this

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<sup>56</sup> Post et al, "Defining Political Will," 657-659.

<sup>57</sup> Interview with NHRI participant 3, Nairobi, Kenya.

situation as a protection ‘grey’ area and continues to handle all complaints it receives from refugees and asylum seekers that deal with human rights violations.<sup>58</sup>

Service provider participants concurred that the government did not appear particularly interested in addressing capacity concerns. As a service provider in Nairobi said: “I feel that the government is not too committed to make sure that things are done effectively where refugees are concerned.”<sup>59</sup> There was also consensus among participants that the political will to engage with refugee matters was heavily influenced by local perceptions of foreign migrants in general, refugee and asylum seekers, or specific groups of refugees and asylum seekers, as reflected in the following quote: “It’s not easy being a refugee in Nairobi. Sometimes you are here, and you don’t want people to know. You behave like you are invisible. You hide your passport especially where you know you have a government which has closed doors to people like us.”<sup>60</sup>

On the notion of “authority”, the findings on the perception of “who” the actor responsible for the reform differed from those views from the South African context. All participants concurred that both the State and the NHRIs had primary roles in reforming the refugee protection regime. The KNCHR has interpreted its mandate to include the promotion and protection of the rights of refugees and therefore, has the authority to advance the promotion and protection of these rights. Similarly, the Refugees Act grants the Refugee Affairs Secretariat the authority to ensure the realisation of refugee rights through its designation as the State organ tasked with managing asylum.

However, the KNCHR reported that it was committed to advancing the realisation of refugee rights, but that the difficulties it faced in fulfilling its obligations to refugees and asylum seekers correlated with the government’s unwillingness to commit to the realisation of refugee rights. In this regard, the KNCHR faces similar challenges to those experienced by

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<sup>58</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>59</sup> Interview with service participant 5, Nairobi, Kenya.

<sup>60</sup> Interview with refugee participant 6, Nairobi, Kenya.



the SAHRC. For instance, this study revealed that the KNCHR also experiences difficulties finding audience with government officials to discuss asylum related matters: “The government has become very abrasive about refugee matters and we’ve seen a lot of resistance to have a humanitarian discussion about anything. It is difficult to engage with state officials especially now that *Internal Security* [Ministry of Interior and Coordination of National Security] is involved.”<sup>61</sup>

Consequently, the KNCHR concluded that the environment it operated in curtailed its efforts to such an extent that it gave rise to perceptions of reluctance to actively engage with the promotion and protection of refugee rights. This has resulted in the KNCHR resorting to “quiet” diplomacy where engagement with asylum matters is concerned to avoid confrontations with public officials.<sup>62</sup> In addition, it has established close working relationships with members of parliament or government officials committed to human rights who then act as “friends” of the KNCHR especially where certain human rights are highly contested.<sup>63</sup> Thus, a high degree of its work in relation to advocating for change in the implementation of the refugee protection regime goes unreported.<sup>64</sup> However, the KNCHR reiterated that despite the socio-political challenges it faces, the constitutional requirement to promote and protect the rights of all people could not be deviated from: “We just forge ahead and do what we can. We have to consider the rights of all people in Kenya even though the government insists that we shouldn’t deal with foreigners.”<sup>65</sup>

Service provider and refugee participants in Kenya held similar views to those in South Africa. They also felt that the NHRIs had not displayed a high degree of willingness to

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<sup>61</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>62</sup> Interview with NHRI participant 3, Nairobi, Kenya. See also Veronica Wambui Mwangi, “Strategic Responses by Kenya National Commission on Human Rights (KNCHR) to Changes in the External Environment,” Masters’ Thesis, University of Nairobi, 2014, 32.

<sup>63</sup> Interview with NHRI participant 3, Nairobi, Kenya; See also KNCHR, *Tribute to Hon. Ken Okoth (1978-2019): Message of Condolence on the Passing of Hon. Ken Okoth, MP, Kibra Constituency*, accessed 17 November, 2019, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1082/Tribute-Hon-Ken-Okoth-1978-2019>.

<sup>64</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>65</sup> Interview with NHRI participant 3, Nairobi, Kenya.

advocate for change in the implementation of refugee law and policies and the asylum experience for refugees and asylum seekers. In addition, service provider and refugee participants concurred with the NHRI participants' belief about the impact of the States' unwillingness to effectively realise refugee rights. They felt that the State was unwilling to engage with refugee-related matters. They believed that the State's unwillingness to engage with refugee-related matters was a factor that impeded the NHRIs' abilities to engage meaningfully with the promotion and protection of refugee rights. In this regard, one participant stated:

NHRIs are simply looking at the protection of the rights of these people. As long as they are within our borders then they need the protection of the law, but once these other conversations such as nationalism and security concerns are sort of built into the bigger narrative, you find now, the NHRI themselves end up suffering as a consequence of that 'coz they are seen as anti-establishment; they are undermined by the political aspect of refugee protection.<sup>66</sup>

#### **7.4 NHRIs utilise the working methods available through their legislative mandates to promote and protect refugee rights**

The findings highlight that the NHRIs in Kenya also utilise the working methods available through their legislative mandates to advance refugee rights, despite the absence of an express requirement within their mandates to either promote or protect these rights. All the NHRIs in Kenya surveyed for this study, have both promotion and protection mandates, however, the extent to which they engaged with matters related to refugees and asylum seekers varied greatly, and in some cases was non-existent.

The findings also confirm that it is the NHRI with the broadest human rights mandate that displays the highest degree of engagement with matters related to migrants broadly and specifically to refugee rights. This finding is similar to that of the SAHRC. However, the findings revealed that despite their broad and similar mandates, the degree to which the

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<sup>66</sup> Interview with service provider participant 5, Nairobi, Kenya.

SAHRC and KNCHR were involved in the promotion and protection of refugee rights varied significantly.

The activities undertaken by the KNCHR fall into two broad categories that is, promotional and protection activities. The promotional activities identified fall into four broad categories: advisory; reporting; human rights education and awareness raising. The protection activities are complaints handling, conducting investigations, and monitoring.<sup>67</sup> These activities were similar to those undertaken by the SAHRC but the implementation processes and challenges encountered differed. As this study did not identify any substantive activities conducted by the Gender Commission or the Commission on Administrative Justice, the findings discussed in this section relate to the KNCHR. Sections 7.4.1 and 7.4.2 discuss how the KNCHR has utilised its working methods by highlighting particular activities that it has implemented. It also discusses the challenges or limitations these methods have had on perceived effectiveness or ineffectiveness in the promotion and protection of refugee rights and will compare and contrast with those findings from the NHRIs in South Africa, in particular the SAHRC. The discussion of the promotional and protection activities follows below.

#### **7.4.1 NHRI Promotional activities**

The KNCHR performs its advisory role in compliance with the Paris Principles. Its activities are similar to those of the SAHRC as it regularly reviews and makes submissions on bills and policies to ensure their compliance with the Constitution and international and regional human rights norms and standards. As discussed in section 7.2 above, the KNCHR's research department, known as Research and Compliance Unit handles this responsibility as it is tasked with monitoring the State's compliance with its international human rights

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<sup>67</sup> OHCHR, *National Human Rights Institutions*, 2010, 75-100.

obligations.<sup>68</sup> A human rights officer within the research compliance unit conducts research and reports on the rights of migrants, refugees, and asylum seekers. These activities are undertaken in consultation with a senior refugee lawyer.<sup>69</sup> Thus, the KNCHR has made submissions on bills and policies with respect to refugees and asylum seekers' rights including: Refugee Bill (2006, 2016), Security Laws Amendment Bill (2014), Health Bill 2012, Migration Policy (2017), and the East African Refugee Management Policy. The KNCHR also reported having regular consultative meetings with members of parliament on human rights and asylum.<sup>70</sup>

Its advisory role has had particular significance in the review of the Refugees Act. In 2016, Parliament passed the Refugees Amendment Bill, 2016 with a view to repeal the Refugees Act, 2006.<sup>71</sup> This Bill proposes guaranteed rights to refugees to education, work, property ownership and a pathway to citizenship.<sup>72</sup> Section 6(a) of the Bill proposed the establishment of the Refugee, Repatriation, and Resettlement Commission whose membership would include the KNCHR (Section 7(1)(c)(viii)), serving in an advisory role. The KNCHR would provide advice on among others, the formulation of policy on refugees in accordance with international standards.<sup>73</sup>

Additionally, Section 11(1) of the Bill proposed the establishment of the Refugee Appeal Board (RAB), which also included the KNCHR with voting rights. The RAB would consider appeals of any decisions made with respect to determination and termination of refugee status.<sup>74</sup> However, the President rejected the Bill citing inadequate public consultations in the drafting process.<sup>75</sup> An amended Bill was re-tabled before Parliament in

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<sup>68</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>69</sup> Human Rights Officer: Migrants, IDPs and statelessness.

<sup>70</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>71</sup> Kenya Gazette, *Refugees Bill 2016*, Kenya Refugee, Repatriation and Resettlement Commission Section 6.

<sup>72</sup> Kenya Gazette, *Refugees Bill 2016*, Sections 34-38.

<sup>73</sup> Kenya Gazette, *Refugees Bill 2016*, Kenya Refugee, Repatriation and Resettlement Commission Section 6.

<sup>74</sup> Section 11(1) (e) and Section 11(5) (a), (b).

<sup>75</sup> See *Business Daily*, "Uhuru rejects bill giving refugees."

September 2019 and is still subject to parliamentary processes.<sup>76</sup> The KNCHR reported that it had continued to engage with the Ministry of Interior and Coordination of National Security, which opposed what it termed as “dangerous clauses”, such as the provision for local integration under Part VII of the Bill.<sup>77</sup>

The KNCHR may also have a significant role to play in the promotion and protection of the rights of refugees and asylum seekers with disabilities as it was designated, in 2011, as the independent monitoring mechanism under Article 33(2) of the Convention on the Rights of Persons with Disabilities.<sup>78</sup> It is perhaps through this role that the proposed 2016 Refugee Bill, contains a clause which requires implementation of the refugee policy giving due regard to persons with disability.<sup>79</sup>

Like the SAHRC, the KNCHR does not have a monitoring and evaluation system in place to ascertain the impact of its advisory role within the national human rights processes. Any impact is anecdotal. A review of its submissions to Parliament shows scant reference to rights of migrants in general. It is also difficult to gauge the extent of the mainstreaming of such rights in its advisory function, despite the presence of a focal point person addressing such rights within the KNCHR. The KNCHR did report having regular consultations with respect to human rights and asylum but this study did not identify any documented evidence of such interactions - for instance through reports, policy briefs or advisories.<sup>80</sup> The findings show that the overall perception is that there is confidence in the KNCHR’s work, and there was acknowledgement that the government frustrated much of its efforts precisely because of

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<sup>76</sup> Government Printer, *Kenya Gazette Supplement No 126: National Assembly Bills No 62 (Refugees Bill)*, 26<sup>th</sup> July 2019, 971 [http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019_compressed.pdf); UNHCR Kenya, *Monthly Operational Update, September 2019*, 2 <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2019/10/Operational-update-September-2019-Nairobi-and-Urban-areas.pdf>.

<sup>77</sup> Kenya Gazette, *Refugees Bill 2016*, Part VII, Section 50.

<sup>78</sup> The initial designation was done in 2011. This was then revoked and the monitoring role vested in the NGECC. In 2017 the designation reverted to the KNCHR. Source: KNCHR, *Disability Focal Point*, accessed 3 June 2019, <https://www.knchr.org/Our-Work/Research-and-Compliance/Disability>.

<sup>79</sup> Kenya Gazette, *Refugees Bill 2016*, Section 25 and 52.

<sup>80</sup> The KNCHR did not submit these to the researcher when the documentation was requested.

how effectively it undertook its activities.

The KNCHR also reports on its activities at the national and international levels. This study found that the KNCHR's reporting varied. While it did not produce any specific report on the realisation of refugee rights, it included activities undertaken in some of its annual reports, which are submitted to parliament and the president. Its website has a section which provides a comprehensive overview of its work on migrant rights. However, there is limited reference to specific work on refugees and asylum seekers on the website and in its regular reports, whether annual or thematic. These inconsistencies in reporting and relatively low levels of information available to the public about refugee rights curtail the KNCHR's ability to influence change for the effective realisation of refugee rights. As Barkow notes, reporting and dissemination of information needs to occur for the public to engage with pertinent issues.<sup>81</sup>

Similar to the SAHRC, the KNCHR submits reports to African Union and UN human rights mechanisms and processes, and where necessary, highlights challenges faced with realising rights for refugees and asylum seekers. For example, its engagement with the Committee on the Elimination of Racial Discrimination (CERD) also reflects the increasing impact that NHRIs can have in demanding accountability at the international level for the realisation of refugee rights.<sup>82</sup> The KNCHR's NHRI report to the CERD also made recommendations concerning refugees and asylum seekers. Specifically, on the right to freedom of movement, the KNCHR noted:

Despite the High Court in *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR* declaring that the encampment policy as illegal, the State did not heed the court

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<sup>81</sup> Rachel E Barkow, "Insulating Agencies," 59-60

<sup>82</sup> For instance, the KNCHR's report to the Special Rapporteur on the right to safe drinking water and sanitation pointed out that urban refugees residing in low-income areas faced similar challenges with access to water and adequate sanitation that Kenyans did. KNCHR, *Status on the Right to Safe Drinking Water and Sanitation in Kenya: Submission to the Special Rapporteur on the Right to Safe Drinking Water and Sanitation February, 2014*.

directive and continued to hold the refugees in refugee camps therefore limiting the right of movement of the refugees to the designated refugee camps.<sup>83</sup>

It proposed that the CERD recommend:

The state should *respect the High Court decision in Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR* and ensure that *refugees have the right of movement within the state; the state in declaring curfew should follow the law and the curfew should not be in force for a disproportionate long periods of time; and the state should improve on the security to its citizens and should only resort to curfew in exceptional circumstances* and for a limited time.<sup>84</sup> [Author's own emphasis]

In its concluding observations to Kenya, the CERD noted its concerns about restrictions on the freedom of movement of refugees, the absence of alternative resettlement options and substandard conditions for those living in the camps.<sup>85</sup> It recommended, among others, that the State “respect[s] the 2013 High Court decision in *Kituo Cha Seria & Others v. The Attorney General* and follow the law when declaring curfews, ensuring that they are not maintained for a disproportionate length of time and are resorted to only in exceptional circumstances.”<sup>86</sup>

With respect to implementation of international obligations related to refugees and asylum seekers, the KNCHR emphasised in its report to the CERD the lack of implementation of the Durban Declaration and Programme of Action. It recommended that the CERD urge Kenya to take urgent steps to implement the Durban Declaration and include the status or progress of such steps in her next submission to the committee.<sup>87</sup> In turn, the CERD requested Kenya to not only give effect to the Durban Declaration and Programme of

<sup>83</sup> KNCHR, *KNCHR: Alternative Report to the Committee on Elimination of all Forms of Racial Discrimination*, March 2017, Nairobi: KNCHR, 2017 para 70-73.

<sup>84</sup> KNCHR, *Alternative Report to CERD*.

<sup>85</sup> CERD, *Concluding Observations on the fifth and seventh periodic reports of Kenya*, 8 June 2017 CERD/C/KEN/CO/5-7, para. 37,

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/KEN/CO/5-7&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/KEN/CO/5-7&Lang=En).

<sup>86</sup> CERD, *Concluding Observations*: Kenya, para 38 (d)

<sup>87</sup> KNCHR, *Report to the CERD* para 130-131.

Action, but to also include information on steps taken to implement it.<sup>88</sup> It is perhaps premature at this stage to confirm a causal link between NHRI reports to treaty bodies and the content of the concluding observations. It is a positive development that the wording of some of the concluding observations reflects proposals that have been put forward by NHRIs.

The third category of promotional activities identified is human rights education (HRE). As discussed in chapter 6, the Paris Principles recommend that NHRIs conduct human rights education. This study found that the KNCHR had also conducted HRE activities with respect to migrants' rights, though, like the SAHRC, these were limited. The KNCHR has a public education and training unit, which has the dual mandate of implementing public awareness programmes and conducting human rights education.<sup>89</sup> Thus, the KNCHR differs from the SAHRC in terms of the institutional structure supporting HRE. Whereas the SAHRC's HRE function falls broadly within its advocacy and communication unit, the KNCHR has definitively fulfilled this duty by the creation of a specific unit tasked with the human rights education function.

This precise delegation is indicative in the number of training manuals, handbooks, and curricula that the KNCHR has developed on a wide range of rights. It has also developed a toolkit for alternative dispute resolution including guidelines, a manual, and a training curriculum. The KNCHR has partnered with three local Kenyan universities' law schools to develop and oversee the implementation of a human rights curriculum for institutions of higher learning.<sup>90</sup> With respect to migrants' rights, the KNCHR has developed a handbook and curriculum for migration and human rights. This curriculum will be used by the Kenya

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<sup>88</sup> CERD, *Concluding Observation: Kenya*, para 40.

<sup>89</sup> KNCHR, [www.knchr.org](http://www.knchr.org).

<sup>90</sup> Lynester Mureu, "Entrenching Human Rights Education in Institutions of Higher Learning," *KNCHR*, accessed 5 September 2019, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1065/Entrenching-Human-Rights-Education-in-Learning-Institutions>; Edwin Nyarangi, "Kenya National Commission on Human Rights and Kisii University Sign Training deal," *StandardDigital*, 23 February, 2019, <https://www.standardmedia.co.ke/article/2001314065/kenya-national-commission-on-human-rights-and-kisii-university-sign-training-deal>; The curriculum was not made available to determine whether it included international refugee law or the protection of refugee rights.



Institute for Migration Studies at the University of Nairobi.<sup>91</sup>

Though the KNCHR reported that it conducted training on refugee rights, and hosted human rights clinic with refugees and asylum seekers, there is limited documentation of these activities. In addition, the focus of the materials developed for human rights education has been broad with little attention paid to refugees and asylum seekers. For example, the handbook on migration and human rights mentions refugees and asylum seekers as a specific category of forced migrants but does not provide any details on their rights or protection issues that affect them.<sup>92</sup> The handbook also does not refer to the 1951 Refugee Convention as one of the legal frameworks for protection choosing instead to focus on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>93</sup> Commenting on the focus on migrants, one participant stated:

There is interest among NHRIs on issues affecting refugees. There was considerable debate around how to conceptualise interventions in Africa in relation to migrants. Given how broad the issue is, the initial thought was to focus on refugees. But the NHRI driving this discourse is in the North [North Africa]. It appears to be under pressure from Europe to find solutions but Europe is interested in a migrant discourse not a refugees' discourse. So, the final wording of the proposed regional project in Africa is a compromise. We managed to include the question of refugees in detention facilities.<sup>94</sup>

The core aspects of the KNCHR's migration and human rights focus area fall under the *Better Migration Management Programme*, which is funded by Germany and the EU and is implemented in the context of the Global Compact on Migration.<sup>95</sup> Its content and outputs have been heavily influenced by the donor objectives.<sup>96</sup> This confirms the assertion made above that the current NHRI activities with respect to forced migration or displacement in

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<sup>91</sup> Interview with NHRI participant 3, Nairobi, Kenya. See also KNCHR, *Migration and Human Rights*. Available at: <https://www.knchr.org/Our-Work/Special-Interest-Groups/Rights-of-Migrants> (Accessed 16 May 2018). The institute was launched on Dec 11 2018 as part of the Better Migration Management Programme. Its target is mid-level managers from the Department of Immigration as well as other government officials from Kenya and other parts of Africa.

<sup>92</sup> KNCHR, *Handbook on Migration and Human Rights*, (Nairobi: KNCHR, 2017), 3,7.

<sup>93</sup> KNCHR, *Handbook on Migration and Human Rights*, 5,

<sup>94</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>95</sup> GIZ, *Better Migration Management Programme*, <https://www.giz.de/en/worldwide/40602.html>.

<sup>96</sup> The Better Migration Management Programme identifies NHRIs as key actors to promote migrant rights.

Africa are not necessarily NHRI-driven, due to the source of the funds. Thus, while migration as an area of focus for NHRIs is gaining traction, there is the possibility that refugee rights will be overshadowed as a result of the implementation of a broad approach to addressing the rights of migrants. As noted in the discussion in section 3.4 of this thesis, the specific areas for NHRI responsibility within the Global Compact for Migration apply equally to refugees and asylum seekers, but the KNCHR practice reinforces the focus on migrant's rights to the exclusion of refugee rights. The evolving norms for NHRI engagement thus focus on migrants' rights broadly and the normative gap for NHRI engagement with refugee rights at the international level will not be sufficiently addressed should NHRI practice continue to focus on migrants' rights.

The absence of refugee specific human rights education material reflects a significant gap in the opportunity to promote a culture that respects the rights of refugees and asylum seekers in Kenya. The inculcation of a security approach to dealing with asylum among public officials attests to the importance of the human rights education function particularly with respect to duty bearers. There is also an opportunity for the KNCHR to encourage responsibility and accountability for effective promotion and protection of the rights of refugees and asylum seekers by targeting the public. This approach is supported by the results of a survey conducted in 2018 on Kenyans' perceptions on refugees, which found that national security was not a primary concern despite the government's assertions.<sup>97</sup> The emphasis of national security concerns, as discussed in section 7.3 above, may also have had a significant impact on how "public" the KNCHR can be about its refugee-related activities that do not constitute serious breaches of international obligations. However, despite the focus on migration broadly, the human rights education activities that the KNCHR has implemented on migration and human rights, provides a basis for the KNCHR to develop

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<sup>97</sup> International Rescue Committee, *Kenya: Citizen's Perceptions on Refugees* (Nairobi: IRC, 2018), 15.

refugee-focused human rights education outputs.

The final category of promotional activities is raising awareness about human rights. As mentioned in section 6.4.1, human rights awareness-raising serves to promote a broader understanding and observance of human rights principles and standards.<sup>98</sup> This study found that the KNCHR has implemented awareness-raising activities targeting refugees and asylum seekers. Unlike the SAHRC's *Roll Back Xenophobia* campaign, the KNCHR has not implemented such a broad-reaching activity. Its reported activities have been with urban Somali refugees and asylum seekers, given that it has identified them as particularly vulnerable to discrimination, arbitrary arrests, detention, and bribery.

The campaign reaching out to Somali refugees and asylum seekers was aimed at raising awareness of the KNCHR's mandate, increasing awareness of rights among refugees and asylum seekers, increasing access to the KNCHR's complaints handling process and was part of the process of implementing its improved referral system.<sup>99</sup> There is currently no formal report on this activity except for a brief reference in its annual report, which noted an increase in the number of complaints from refugees and asylum seekers as a result.<sup>100</sup>

#### **7.4.2 NHRI Protection activities**

The protection activities that NHRIs undertake include complaints handling, investigations, and monitoring.<sup>101</sup> This study found that the KNCHR conducts protection activities. In terms of complaints handling, the KNCHR receives complaints from refugees and asylum seekers.<sup>102</sup> The KNHRC categorised these complaints as group rights' violations, but does not always provide a complete breakdown of the number of complaints that relate specifically to refugees and asylum seekers. For instance in 2017, it reported that 342 or seven per cent of its

<sup>98</sup> OHCHR, *National Human Rights Institutions*, 2010.

<sup>99</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>100</sup> KNCHR, *Annual Report, 2016/2017*, accessed 8 June, 2019, <https://www.knchr.org/Portals/0/2016-2017.pdf>.

<sup>101</sup> OHCHR, *National Human Rights Institutions*.

<sup>102</sup> Based on a review of KNCHR's Annual Reports 2012-2017.

caseload constituted complaints on violations related to group rights with refugees and asylum seekers forming the bulk of these complaints.<sup>103</sup> In 2013, its report only provided the total number of group rights' complaints handled, which were 218.<sup>104</sup> However, in 2015 and 2014, it reported on the number of complaints that related specifically to refugee rights as 80 and two respectively.<sup>105</sup>

Most of these complaints are referred to the Refugee Consortium of Kenya (a local legal aid CSO) or the Refugee Affairs Secretariat.<sup>106</sup> The KNCHR, depending on the nature of the complaints, may also provide legal advice, recommend alternative dispute resolution measures, or conduct further investigations.<sup>107</sup> This study found that neither the Gender Commission nor the Commission on Administrative Justice reported handling complaints related to refugees or asylum seekers.

The KNCHR also litigates on matters related to refugee rights. For instance, in *Kituo Cha Sheria & Kenya National Commission on Human Rights v Attorney General & 3 others* (*Kituo Cha Sheria v Attorney General*), the KNCHR and a local CSO, *Kituo Cha Sheria* (Legal Advice Centre) challenged the constitutionality of a series of government decisions with respect to refugees and asylum seekers in Kenya. The court found that the government's decisions to close the Dadaab refugee camp without first consulting stakeholders, and to forcibly repatriate Somali refugees and asylum seekers, was unconstitutional.<sup>108</sup> The court also found that the proposed repatriation of all refugees in Dadaab camp to Somalia was a violation of the principle of *non-refoulement*.<sup>109</sup> Furthermore, the court held that the Government's decision to disband the Department of Refugee Affairs was *ultra vires* and

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<sup>103</sup> KNCHR, *Annual Report, 2016/2017*.

<sup>104</sup> KNCHR, *Annual Report, 2012/2013*.

<sup>105</sup> KNCHR, *Annual Report, 2013/2014, 2014/2015*.

<sup>106</sup> KNCHR, *Annual Report, 2014/2015*.

<sup>107</sup> KNCHR, *Annual Report 2016/2017*, 14-15.

<sup>108</sup> Contravened the right to a fair administrative action as guaranteed by Article 47 of the Constitution and as given effect by the Fair and Just Administrative Act No. 4 of 2015, sections 4 & 6.

<sup>109</sup> *KNCHR v Attorney General*.

thus null and void.<sup>110</sup> The KNCHR's action led to the suspension of the implementation of these government directives and forcible repatriation of Somali refugees and asylum seekers.

While participants concurred about the importance of the KNCHR's complaints handling mechanism, there were perceived challenges about its utility for the protection of refugee rights. The first challenge was that of reporting and doing so in a manner that allows for meaningful interpretation of data.<sup>111</sup> This study found that the KNCHR had only begun to consistently include in its annual reports reference to handling complaints from refugees and asylum seekers from 2013. There was no indication of refugee or asylum seeker complaints handled between the year of its initial establishment (2002) and 2012.

Furthermore, the method of reporting, as mentioned above, does not utilise a standard format and the information provided lacks detail. This makes it difficult to determine the nature of the complaints and to draw conclusions about the situation of refugees and asylum seekers in Kenya. This conclusion is similar to that drawn with respect to the NHRIs in South Africa, where this study found challenges with reporting methods that the NHRIs employed. In addition, the KNCHR refers many of the cases it receives to its referral partners. There was no evidence to indicate the reasons for the referrals or documentation of the follow-up on each complaint that it has referred out.

None of the participants had utilised the complaints handling mechanism and not many participants were aware about specific cases handled, except for those highlighted in the media.<sup>112</sup> It was thus difficult to determine the perceptions that participants had with respect to the KNCHR's use of the complaints handling mechanism. However, the NANHRI had conducted a mapping survey of African NHRI complaints handling systems, which identified several factors that had an impact on the KNCHR's ability to utilise this

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<sup>110</sup> Section 6 of the 2006 Refugee Act established the Department of Refugee Affairs. Its dissolution would require an amendment to the Refugee Act. The DRA has since been replaced by the Refugee Affairs Secretariat.

<sup>111</sup> Rachel E Barkow, 'Insulating Agencies', 59.

<sup>112</sup> These cases were the *Kituo Cha Sheria v Attorney General* and the *CORD, KNCHR & another v Republic of Kenya & 10 others*.

mechanism. These included: legal proceedings against the KNCHR; attempts by politicians to undermine its credibility; and attempts by politicians to direct the work of the Commission.<sup>113</sup>

Finally, complaints handling is influenced by how accessible the NHRI is to the public. While, the KNCHR has several offices in addition to its headquarters, its offices are regional and do not cover all the major administrative hubs. This has hampered physical access to the institution, but the institution implements outreach activities, which serve to increase the public's access to its services. For example, the KNCHR conducts numerous human rights clinics and has established human rights desks (*Huduma* desks) in strategic areas in Kenya to increase its accessibility especially to refugees and asylum seekers. It has also enhanced its referral system to ensure complaints are referred to appropriate institutions where it determines that the complaint is inadmissible. This system includes a follow-up process for each case that has been referred out to partners.<sup>114</sup> These strategies are discussed in detail in section 7.6 below, which addresses NHRI visibility.

The second category of protection activities is investigations. Investigations usually seek to address systemic human rights concerns or those that affect a large segment of the population. Like the SAHRC, the KNCHR has utilised this function to address systemic human rights violations. It has however, not conducted any public inquiries related directly to addressing violations of refugee rights, though several of its inquiries made findings, which had implications for refugees and asylum seekers. For example, it conducted an inquiry into statelessness in Kenya and another on access to national identity documents. The inquiry on identity documents included findings that eventually informed policy and improved access to identity documentation for refugees and asylum seekers.<sup>115</sup> However, the inquiry into statelessness was not conceptualised to include investigating the situation of refugees and asylum seekers, who are or at risk of becoming stateless, despite evidence suggesting that

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<sup>113</sup> NANHRI, *Mapping Survey of Complaints Handling*.

<sup>114</sup> Interview with NHRI participant 3, Nairobi, Kenya; KNCHR, *Annual Report 2016/2017*.

<sup>115</sup> KNCHR, *Out of the Shadows*: 9-10; KNCHR, *An Identity Crisis*.

statelessness among refugees is a problem.<sup>116</sup> This shortcoming may be due to the absence of a coherent approach to addressing refugee rights or as the socio-political context implies, challenges faced when engaging with refugee rights.

It is worth noting that Burdekin and Brodie have found that the public inquiry function is as one of the most useful tools that an NHRI can utilise to address systemic human rights violations.<sup>117</sup> The fact that the KNCHR has identified refugee rights as priority rights and acknowledges that the challenges are primarily systemic, is one hurdle that has been overcome. The challenge remains to identify ways to effectively integrate refugee rights within its protection function and the public inquiry function would be useful in this regard.

### **7.5 Capacity constraints negatively impact on the extent to which the NHRIs can effectively promote and protect refugee rights**

This study found that capacity constraints have had a negative impact on the extent to which the KNCHR's can effectively promote and protect refugee rights. The KNCHR reported a consistent decrease in funding every year since its establishment, despite an increase in its monitoring obligations, including as the designated monitoring mechanism under the CRPD: "Our [2019] budget was cut by 80%. This essentially means that we have money to pay for salaries and barely anything is left for substantive work."<sup>118</sup> This has affected implementation of programmes, recruitment and has led to a heavy reliance on donor funding to support its core administrative functions and some key programmes. For example, one of its senior staff members, the Senior Legal Advisor, is seconded from an international NGO

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<sup>116</sup> ENCA, "Stateless refugees fear their fate in Kenya," *ENCA*, 8 July 2016 <https://www.enca.com/africa/stateless-refugees-ponder-their-fate-in-kenya>; Oscar Gakuo Mwangi, "Statelessness, Ungoverned Spaces and Security in Kenya," in *Understanding Statelessness*, eds. Tendayi Bloom, Katherine Tonkiss and Phillip Cole (London: Routledge, 2018), Chapter 8.

<sup>117</sup> Brian Burdekin, "The Role of National Inquiries in the Protection of Social and Economic Rights," in *National Human Rights Institutions and Economic Social and Cultural Rights*, eds. Eva Brems, Gauthier de Beco, Wouter Vandenhoele (Cambridge: Intersentia, 2013), 181-; Megan Brodie, "Law, Change and Socialisation: Constructing an Account of the Role of NHRIs in Addressing Systemic Human Rights Violations: A Case Study of National Inquiries conducted by NHRIs across the Asia-Pacific Region," (PhD Thesis, University of Melbourne, 2017)

<sup>118</sup> Interview with NHRI participant 1, Nairobi, Kenya

and is tasked with providing oversight over the KNCHR's refugee-related activities.<sup>119</sup>

Additionally, the KNCHR relies heavily on donor funding to implement its migrants' rights programme and this has resulted in a broad focus on migrants' rights to suit donor project goals.

The findings also show that an NHRI's organisational structure has had an impact on its capability to engage substantively with asylum-related matters. The KNCHR's, organisational structure differs from that of the SAHRC, as discussed in chapter 6, section 6.5. In the KNHRC, a Commissioner is tasked with convening the Public Education and Training and Research Units. The Research Unit oversees matters related to migrants rights and has a staff member tasked with dealing with migrants rights including refugee rights. Additional support is through the senior legal advisor. Both these staff members have competence in refugee law.<sup>120</sup> Considering Hyman and Kovacic's argued that one of the factors that affects an institution's ability to effectively implement its mandate is its investment on capacity.<sup>121</sup> This requires that the necessary technical skills are available to implement its mandate. Thus, the KNCHR's allocation of technical skills to address refugee rights reflects more coherence than the SAHRC and may provide better results. This reflects the norms about the need for NHRIs to operate with the requisite technical capacity.<sup>122</sup> However, the implications of this on the effectiveness of the KNCHR to engage with refugee rights is not as simple as the above statement suggests. For instance, it is difficult to gauge the impact on its effectiveness, as its engagement with the refugee protection regime has been primarily through negotiations with government officials in the background as reflected in the discussion in section 7.3 on the socio-political context. In addition, having one permanent

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<sup>119</sup> Interview with NHRI participant 1, Nairobi, Kenya.

<sup>120</sup> Interview with NHRI participant 1, Nairobi, Kenya.

<sup>121</sup> Where capacity refers to adequate resources at the institutions disposal to perform its functions well, and capability denotes the statutory powers, organisational structure and mechanisms in place for effective application of its authority. See Hyman and Kovacic, "Why Who Does What Matters," 1474

<sup>122</sup> International Council for Human Rights Policy, *Assessing the Effectiveness*, 15; NANHRI, *Study on the State of African NHRIs*, 84.



staff member tasked with addressing refugee rights and all other rights issues that arise from displacement and irregular migration, is not sufficient to effectively meet the demands of addressing these rights. As noted by KNCHR: “There’s only one staff member, a human rights officer tasked with handling matters relating to migrants, internally displaced persons, statelessness and refugees. It’s a huge task.”<sup>123</sup>

Furthermore, this study found that the focus area on migration has not translated into mainstreaming of migrants’ rights into the other areas of the KNCHR’s work, which is similar to the situation with the SAHRC. A review of the KNCHR’s reports highlighted that the issues affecting refugees or asylum seekers were not incorporated in other aspects of its activities. These also appeared to be dealt with in an ad hoc manner. Service provider participants also felt that capacity constraints limited the NHRIs’ effectiveness. For instance, one participant stated: “The Kenyan NHRI has been forced to spend valuable time pursuing donor funding, which means a considerable amount of their limited resources are spent on developing proposals and not on actual programme work.”<sup>124</sup> Thus, the KNCHR also faces the challenge of developing and implementing a coherent approach to addressing refugee rights within its programmatic activities, to ensure the strategic inclusion of refugee rights in the relevant aspects of its work.

## **7.6 NHRIs are invisible and are not prioritising the promotion and protection of refugee rights**

*“If they exist, then what work are they doing for refugees?”<sup>125</sup>*

This study found that the NHRIs in Kenya were perceived to be not only invisible within the refugee protection regime, but that they were also not prioritising refugee rights as reflected in this statement: “The KNCHR has not been allocated a space within the refugee discourse

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<sup>123</sup> Interview with NHRI participant 1, Nairobi, Kenya

<sup>124</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>125</sup> Interview with refugee participant 7, Nairobi, Kenya.

here. I'm not certain how much noise it has made about it, but its voice is definitely necessary especially given the importance of adopting a human rights-based approach to handling the issues."<sup>126</sup> Considering the discussion on invisibility in chapter 6 of this thesis, the complexities of invisibility manifest within the Kenyan refugee protection regime. In Kenya, the question "invisible in what way" is reflected in the determination of the key actors within the refugee protection regime. The delineation of implementing partners by the UNHCR, led to the obvious absence of stakeholders such as NHRIs. The question "why" as Polzer and Hammond argue is about "the power to decide who receives resources, who has the legitimacy to make their voices heard, or who can be harmed or ignored without consequences."<sup>127</sup> As the securitisation of asylum has become more entrenched, the NHRIs have increasingly had their space for engagement minimised and resources to undertake crucial work with respect to rights promotion and protection reduced to such an extent that it has become difficult to undertake any work on refugee rights. These factors have then led to the NHRIs being invisible to stakeholders within the refugee protection regime.

The perceived NHRI absence within the refugee regime in Kenya was also attributed to the lack of understanding of the roles that NHRIs play as indicated in this statement from a service provider participant:

I think there hasn't been a proper appreciation of the role that NHRIs can play in this, because CSOs have been involved. They [NHRIs] might have a direct interaction on the ground and they still have access to the UN agencies, for example, but I think broadly it's still the lack of an appreciation of what NHRIs can facilitate and how they can assist in this, given the rather broad mandate that they have.<sup>128</sup>

Triggs identified the lack of understanding of the role that NHRIs play in advancing human rights as a challenge that many NHRIs faced.<sup>129</sup> She further argued that this lack of

<sup>126</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>127</sup> Tara Polzer and Laura Hammond, "Invisible Displacement," 417

<sup>128</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>129</sup> Gillian Triggs, "The independence of national human rights institutions," *Humane Rights in 2016*, Future Leaders, 2016:56; See also OSCE, *Outcome report: Expert meeting on strengthening the independence of*

understanding might contribute to low levels of engagement with NHRIs and in turn perceptions that the NHRI is invisible or not engaging effectively with human rights. The evidence from this study supports Triggs' assertions. The primary contributing factors in Kenya are the socio-political context and the lack of recognition of any of the NHRIs within the UNHCR's partnership framework with respect to refugee protection in Kenya.<sup>130</sup> As one service provider participant stated: "The KNCHR faces a particular challenge because its role is not understood. It [the KNCHR] has not been provided with the space that could enhance its role given its broad mandate in advancing refugee rights. The refugee protection regime in Kenya has, as a result, evolved largely to the exclusion of the KNCHR and the other NHRIs."<sup>131</sup>

For example, a UNHCR-funded assessment of the capacity for refugee protection in Kenya conducted in 2006, identified the KNCHR as a constituent part of the national and administrative refugee framework but did not indicate its role or function within this framework, merely noting that it also had "responsibilities and an interest in refugee affairs."<sup>132</sup> The UNHCR also wrongly identified the KNCHR as part of the Ministry of Justice and Constitution Affairs rather than an independent State institution.<sup>133</sup> The situation for the NHRIs in Kenya also reflects Ferris' concerns about UNHCR's dominant role within a domestic refugee protection regime. Ferris in her study on the role of domestic actors and refugee rights protection, determined that the UNHCR's dominance within a domestic refugee protection regime would have a detrimental impact on the opportunities for engagement by actors such as NHRIs.<sup>134</sup>

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*NHRIs in the OSCE region ODIHR premises, Warsaw, Poland, 28-29 November 2016, accessed 2 December, 2019*<https://www.osce.org/odihr/310331?download=true>.

<sup>130</sup> Turton, Danny and UNHCR, *Analysis of Refugee Protection Capacity: Kenya*, 2006

<sup>131</sup> Interview with service provider participant 5, Nairobi, Kenya

<sup>132</sup> UNHCR, Kenya: *Comprehensive Refugee Programming 2016*. Nairobi: UNHCR-Kenya, 2016:10

<sup>133</sup> UNHCR, Kenya: *Comprehensive Refugee Programming*, 10

<sup>134</sup> Elizabeth Ferris, "Protracted Refugee Situations, Human Rights and Civil Society," 95-98. See page 15 of this thesis.

The findings also indicated that refugees in Kenya had a low level of awareness of the NHRIs and their role within the refugee protection regime, as summed up by the opening quote by a refugee participant: “If they exist, then what work are they doing for refugees?”<sup>135</sup> This finding contrasts with the KNCHR’s perception as it indicated that the designation of migrants’ rights was a reflection of its prioritisation of all migrants’ rights including refugee rights. The KNCHR reported that it has also implemented specific strategies to enhance its visibility within local communities and especially among refugees and asylum seekers in Nairobi. To achieve this, the KNCHR partnered with the Ministry of Devolution to create human rights desks in community centres in Nairobi. The primary aim of the collaboration was to increase accessibility to its complaints handling services through the government run one-stop centres for civic services (referred to as *Huduma* (“Assistance”) Centres).

The KNCHR established a desk in three of these *Huduma* centres in Nairobi, one of which was in Eastleigh, a suburb that hosts the largest population of urban Somali refugees and asylum seekers.<sup>136</sup> The KNCHR conducts legal aid clinics at these sites and holds public awareness meetings to educate the community about its mandate and refugee rights.<sup>137</sup> These activities are conducted in partnership with the CSOs that form part of its referral network to facilitate the expeditious referral of complaints that the KNCHR considers inadmissible.<sup>138</sup> The KNCHR reported that the Eastleigh human rights desk accounts for the highest number of complaints received that relate to the violation of rights reported by refugees and asylum seekers.<sup>139</sup>

It is difficult to determine the effectiveness of this approach, as this study did not find any evaluation of the impact of the use of the *Huduma* desks. However, since the creation of the desks, the KNCHR reported an increase in numbers of refugees and asylum seekers

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<sup>135</sup> Interview with refugee participant 5, Nairobi, Kenya

<sup>136</sup> Pavanello, Sara, Elhawary, Samir and Pantuliano, Sara, “Hidden and Exposed.”

<sup>137</sup> KNCHR, *Annual Report 2015/2016*.

<sup>138</sup> KNCHR, *Annual Report 2015/2016*, 51.

<sup>139</sup> KNCHR, *Annual Report 2015/2016*, 51.

seeking assistance through its offices.<sup>140</sup> Anecdotally, it could thus be inferred that there has been an increase in the awareness of rights among the refugees and asylum seekers within that community, and an increase in the knowledge about means through which redress could be sought.

As discussed earlier, the KNCHR asserted that its perceived lack of engagement with refugee matters could not be deemed as a lack of engagement with refugee protection on its part. Rather, that the hostile environment in which it operated, in with respect to asylum matters, necessitated that it employed strategies that were not viewed as adversarial to the government. These included “quiet” diplomacy and the establishment of and use of networks of ‘friends’ within parliament and relevant state organs. While these strategies may serve to achieve particular goals, they may impact negatively on the NHRI’s actual and perceived legitimacy and independence.<sup>141</sup>

### **7.7 Opportunities to enhance NHRIs’ engagement with refugee rights**

All participants concurred that there were opportunities available that could enhance NHRIs’ engagement with the promotion and protection of refugee rights in Kenya. These were increasing NHRI institutional capacity, increasing accessibility and enhancing visibility, enhancing relationships with CSOs and the UNHCR, and enhancing regional cooperation on asylum-related matters.

Increasing institutional capacity to handle refugee matters was highlighted as particularly critical for the NHRIs. This is with respect to increasing funding, increasing human resources and building technical skills on refugee or asylum law. As discussed with respect to the South African NHRIs, building institutional capacity would require the use of specific strategies, including utilising mechanisms already at the disposal of the NHRIs. For

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<sup>140</sup> KNCHR, *Annual Report 2015/2016*, 51.

<sup>141</sup> Asia Pacific Forum, “Fact Sheet 3: The Importance of Independence,” *APF*, accessed 20 December, 2019, <https://www.asiapacificforum.net/support/what-are-nhris/independence/>.

the KNCHR, its designation as a national monitoring mechanism under Article 33 (2) of the Convention on the Rights of Persons with Disabilities could be a vehicle for monitoring the rights of refugees and asylum seekers who have disabilities. This would also apply should the KNCHR be designated as the National Preventive Mechanism (NPM) under the OPCAT, which Kenya is yet to ratify. However, the KNCHR has additional functions and powers mandated through the Prevention of Torture Act, 2017 (Sections 12(1)-(3), 13(1)(b) and 25 (1)-(2)) which provide the current avenue for investigating torture-related complaints and reporting on the situation of refugees and asylum seekers in relation to torture prevention.

Importantly, and as argued by Welch, such an approach may have minimal impact on budgetary or human resource allocation for the KNCHR and this would allow for greater accountability for the realisation of refugee rights at even the international levels through the treaty bodies.<sup>142</sup> NHRIs could also operationalize the legislative requirement to ensure a cohesive approach to addressing human rights among the three institutions.<sup>143</sup> This would enhance the NHRI's capacity to, for instance, ensure that systemic issues affecting asylum in Kenya are addressed strategically by all three NHRIs.

The second opportunity for consideration for enhanced NHRI engagement with refugee protection related to accessibility and visibility. As indicated above, in terms of physical access, the KNCHR has regional offices located in urban areas, but it does not have physical presence within rural communities or in many communities where the most vulnerable reside. However, the efforts that the KNCHR has made to overcome this, by negotiating with local governments to create human rights desks in places where civic services are offered is a good attempt at remedying the challenges of physical accessibility. The KNCHR has also integrated short message services (SMS) into its electronic complaints

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<sup>142</sup> Ryan Welch, "National Human Rights Institutions, 109

<sup>143</sup> Laws of Kenya, *Kenya National Commission on Human Rights Act 14 of 2011*, Section 8 (h) states: ...work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.

handling platform. This has resulted in an increase in the number of cases lodged with the institution.<sup>144</sup> These practices may be adapted by the SAHRC and other NHRIs to overcome challenges with accessibility.

Enhancing relationships with CSOs was perceived as another opportunity for the KNCHR to enhance their engagement with refugee rights. This study found that the KNCHR has good working relationships with CSOs, but that these networks needed to be strengthened for more substantive engagement to occur. The findings indicate that the KNCHR collaborated with CSOs primarily with respect to complaints handling. For instance, in the two refugee related cases, *Kituo Cha Sheria v Attorney General* and *CORD, KNCHR & another v Republic of Kenya & 10 others*, in which the KNCHR challenged the constitutionality of government decisions, were initiated in collaboration with CSOs and highlight the importance of strong partnerships between the KNCHR and CSOs. However, none of the websites of the CSOs that provide legal aid services to refugees and asylum seekers referred to the KNCHR as a possible avenue for redress for human rights violations.<sup>145</sup> Except for its awareness-raising activities with respect to the human rights desks, this study found no evidence to indicate the KNCHR's involvement in other refugee-related promotional activities implemented on its own accord, or in partnership with CSOs. This may point to the absence of sustained substantive engagement between the KNCHR and CSOs addressing refugee rights.

Similarly, some participants felt that there was need for the KNCHR to enhance its relationship with the UNHCR. This study found that the relationship between the UNHCR and the NHRIs in Kenya is also perceived to be weak, as reflected in this participant's assertion that: "the UNHCR in Kenya needs to review how it interacts with the KNCHR. It

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<sup>144</sup> KNCHR, *Annual Report, 2016/2017*.

<sup>145</sup> These are CSOs identified by UNHCR as implementing partners and are the Refugee Consortium of Kenya and the Kituo cha Sheria (Legal Advice Centre-Kenya). Source: UNHCR, *Implementing Partners, Kenya*, <https://www.unhcr.org/ke/unhcr-partners-kenya>.

cannot be that it works with NGOs, sometimes the Gender Commission but the KNCHR is nowhere to be seen.”<sup>146</sup>

As discussed in chapter 4, the UNHCR has played a prominent role within the RSD process in Kenya, which has perhaps necessitated the formation of more robust engagement with civil society stakeholders. However, the engagement with stakeholders has occurred to the exclusion of the KNCHR and other NHRIs, as the UNHCR does not consider these institutions as implementing partners.<sup>147</sup> The KNCHR is UNHCR’s implementing partner only with respect to statelessness and internally displaced persons and not in relation to refugees and asylum seekers.<sup>148</sup> This has led to a significant gap in institutional collaboration between the two entities with respect to refugee rights, as indicated by this participant’s observation:

I think that we need to demystify the interaction with the UN at country level to be honest because you’ll find that they’ll deal directly with some local NGOs or CSOs and then the central government and not with other important actors like the KNCHR and ...that is a lost opportunity. NHRIs have regional and sub-regional blocs and crosscutting issues can be addressed through these blocs. This might assist the UNHCR greatly in its work not only at country level but also within the region.<sup>149</sup>

Thus, even though the UNHCR was *amicus curiae* in the *KNCHR and Kituo cha Sheria v the Attorney General* when Kenya threatened to close one of its refugee camps, this was not based on a substantive relationship, such as for instance on litigation support to the NHRI.<sup>150</sup> While this implies that the institutions are not averse to working together on matters related

<sup>146</sup> Interview with service provider participant 5, Nairobi, Kenya.

<sup>147</sup> UNHCR, “Kenya: List of Implementing Partners,” UNHCR, [www.unhcr.org](http://www.unhcr.org)

<sup>148</sup> It is because of this relationship that the UNHCR developed the *UNHCR Checklist for Field Offices for Engaging with NHRIs* in the context of IDP protection. Other NHRIs included were: Afghanistan, Colombia, Nigeria and the Philippines. UNHCR, *UNHCR Engagement with National Human Rights Institutions for IDP Protection: Stocktaking Exercise (A Checklist for Engagement with NHRIs)*, February 2016 <https://www.refworld.org/docid/571a19194.html>.

<sup>149</sup> Interview with service provider participant 5, Nairobi, Kenya (NANHRI)

<sup>150</sup> *KNCHR v Attorney General*



to refugees and asylum seekers, the UNHCR and the KNCHR did not collaborate on subsequent litigation related to refugee rights.

The fact that there exists a clear demarcation about which persons of concern the UNHCR is willing to engage with, with respect to the KNCHR, is perhaps an indictment of the influence of the political context it operates in. This could also be symptomatic of the relationship that NHRIs have with the UNHCR at the international level. Unlike the robust interaction that has evolved between the NHRIs and the treaty bodies, the Human Rights Council, the OHCHR, and the UNDP, there is no formalised interaction between NHRIs and the UNHCR at the international level.<sup>151</sup> This is despite the UNHCR having expressly recognised NHRIs' importance in "protecting and monitoring respect for the rights of asylum-seekers and refugees" including in specific situations such as combatting racism and xenophobia against refugees.<sup>152</sup> The evidence that the KNCHR is engaging substantively with the promotion and protection of refugee rights, in spite of the hostile political context within which it operates in, requires that the UNHCR considers a formal role for the KNCHR to promote the realisation of refugee rights.<sup>153</sup>

Lastly, some participants suggested that cooperation among NHRIs within the region would enhance the promotion and protection of refugee rights. The KNCHR is already involved in various capacities at the regional level. It is a member of the East African Network of NHRIs. It has within this network contributed to the development of an early

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<sup>151</sup> GANHRI, *National Human Rights Institutions and United Nations Treaty Bodies* (Geneva: GANHRI, 2016) <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Annual%20Meeting%20of%20Chairpersons%20of%20Human%20Rights%20Tre/GANHRI%20background%20paper%20FINAL.pdf>.

<sup>152</sup> Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: A Handbook for Parliamentarians*, (UNHCR and IPU: 2017), 37; UNHCR, "Combating Racism, Racial Discrimination, Xenophobia and related Intolerance through a Strategic Approach", (Geneva, Dec 2009), <https://www.refworld.org/rw/pdfid/4b30931d2.pdf>; paragraph 13.

<sup>153</sup> UNHCR, *Implementing Partners, Kenya*, <https://www.unhcr.org/ke/unhcr-partners-kenya>: UNHCR has signed cooperation agreements with NHRIs with respect to the promotion and protection of the rights of refugees, asylum seekers and other persons of concern e.g. with the Montenegro Human Rights Ombudsman, accessed 3 September 2019, <https://www.unhcr.org/see/10792-ombudsman-and-unhcr-sign-technical-cooperation-agreement.html>. Thus, the UNHCR's lack of an agreement with KNCHR with respect to promotion and protection of rights of refugees and asylum seekers implies the influence of the political context in Kenya

warning system for conflict prevention.<sup>154</sup> It is also a member of the Network of African NHRI's working group on migration.<sup>155</sup> This working group promotes NHRI engagement within migration processes among African NHRIs, within the AU and at the global level with the view to promote a common NHRI approach to addressing migration issues.<sup>156</sup> The working group also provides oversight for the regional NHRI network's Migration in Africa project, which includes developing guidelines for NHRIs to monitor refugees and asylum seekers in places of detention.<sup>157</sup> In addition, the KNCHR is a member of the technical team drafting the East African Refugee Management Policy.<sup>158</sup> These processes provide important platforms to build capacity and to generate good practice that the NHRIs can adapt to ensure effective engagement with refugee protection.

There is a dearth of evidence of the Kenyan NHRIs' engagement with the regional AU human rights mechanisms in general or specifically on refugee rights. As discussed in chapter 6, despite efforts to foster the relationship between NHRIs and the AU mechanisms, the engagement between these institutions lacks substantive and sustained engagement. Certainly, the recent amendment to the African Commission's rules of procedure to include specialised human rights institutions such as the Gender Commissions and Ombudsman institutions widens its scope of engagement with NHRIs and may serve as an impetus for renewed collaboration. This may be of particular relevance within the Kenyan context as the Commission on Administrative Justice is mandated to oversee the implementation of decisions of international tribunals including that of the African Commission.

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<sup>154</sup> Interview with NHRI participant 3, Nairobi, Kenya.

<sup>155</sup> NANHRI, "Working Group on Migration," *NANHRI*, accessed 3 September 2019.

<sup>156</sup> NANHRI, "Working Group on Migration."

<sup>157</sup> NANHRI, *Migration in Africa*, 3.

<sup>158</sup> Interview with NHRI participant 3, Nairobi, Kenya.

## 7.8 Conclusion

The findings show that in Kenya, the NHRI with the broadest mandate has had the most engagement with the refugee protection regime. This study also found that the two NHRIs with specialised mandates in Kenya, that is the Gender Commission and Commission on Administrative Justice, were almost completely absent within the refugee protection regime in Kenya. This is despite evidence showing that there was an implementation and protection gap with respect to issues that fell within their mandates, including on the gendered aspects of asylum with respect to the Gender Commission and maladministration and corruption in relation to the Commission on Administrative Justice.

In addition, this study found that there are critical underlying issues that have affected the extent to which NHRIs in Kenya could effectively engage within the refugee protection regime. The discussion on the impact of the socio-political context on the promotion and protection of refugee rights highlights the limitations that the Kenyan government has placed on state institutions with respect to dealing with asylum related matters. This has had a significant impact on the nature and extent of the KNCHR and potentially the other NHRIs' engagement with the promotion and protection of refugee rights. While the socio-political factors that have had an impact on the NHRIs are similar to those identified in the South African context, their manifestations in Kenya varied. In Kenya, this study identified an emphasis on the securitisation of asylum. However, in South Africa, xenophobic attitudes were identified as the most pertinent socio-political issue that affected the extent to which NHRIs could engage with the refugee protection regime and influence change.

In addition, challenges related to institutional capacity, having strong and sustained relationships with CSOs addressing refugee rights and with the UNHCR, require attention - to ensure an enhanced NHRI engagement with refugee rights. The KNCHR has also displayed a high degree of commitment to advancing the promotion of migrants' rights in

general, not only in Kenya but also within the region. This provides an important avenue to heighten NHRI's engagement with refugee rights and the development of coherent or common approaches for African NHRIs to address these rights.

Finally, this study has illustrated that despite a constraining operational environment, NHRIs can develop strategies to ensure that their mandate to promote and protect refugee rights is realised. In this regard, this study highlighted the KNCHR's willingness to adapt to the environment it operates in by use of specific strategies. These include: interpreting its mandate very broadly; use of "quiet" diplomacy and establishing friendly networks within parliament and among public officials; creating human rights desks in civic centres located within areas where large numbers of refugees and asylum seekers reside; enhancing its referral networks with actors providing assistance to refugees and asylum seekers; and using mobile phone technology to increase access to its services.

## Chapter 8

### Conclusions and Recommendations

#### 8.1 Summary of findings

This study examined the extent to which NHRIs in South Africa and Kenya are protecting refugee rights. The purpose was to answer four questions: do NHRIs in South Africa and Kenya have the capacity and capability to effectively promote and protect refugee rights?; to what extent are NHRIs in South Africa and Kenya addressing refugee rights in their respective States?; are there any challenges or barriers that impact on the NHRIs' responsibility to effectively promote and protect refugee rights in South Africa and Kenya respectively?; and how can the NHRIs in South Africa and Kenya strengthen their capacities to effectively promote and protect refugee rights?

To understand their role, this study first set out to define NHRIs and to locate them within the international human rights system. The findings show that NHRIs have evolved to become distinct features of the international human rights system and have played an integral role in the diffusion of international human rights norms and standards at the domestic levels. It shows that increasingly, international human rights mechanisms consider NHRIs' role as broader than simply reporting on the domestic human rights situation. These mechanisms now pursue substantive engagement with NHRIs to develop strategies to enhance the promotion and protection of groups or particular rights such as children's rights, disability rights, rights of older persons, women's rights, prevention of torture, and business and human rights.

Academic scholarship on NHRIs has also evolved in tandem to give particular attention not only to their evolution and global spread, but also to their effectiveness as agents for human rights accountability. Although there are arguments for the reconceptualization of refugee protection as a human rights issue or to interpret international refugee law using a

human rights lens, there is a gap in the concomitant advancement within the international refugee law regime discourse of a defined role for NHRIs. There has not been a precise recognition of NHRIs as the actors bridging the implementation gap between international refugee rights norms and standards and domestic practice.

Nonetheless, arguments for reforming the international refugee protection regime now include discussions on defining a clear role for other actors within the protection regime. Such arguments have identified the normative and implementation gaps within international refugee law to situate the argument for a heightened role for actors such as NHRIs within the refugee protection framework. The thesis has argued that the consideration of NHRIs as key actors lies in the nexus between international refugee law and international human rights law. Carver goes further to state that “[i]f refugee protection is to be reconceptualised in human rights terms, these independent governmental actors [NHRIs] will have to play a central role.”<sup>159</sup>

The challenge is that there is currently limited evidence available indicating the extent to which NHRIs can facilitate accountability within the international and domestic refugee protection regimes, and if they can do so effectively. This study therefore provided empirical evidence to support the argument that NHRIs are a necessary constituent of a refugee protection regime as they can ensure accountability for the promotion and protection of refugee rights. It has also shown that NHRIs have the capacity and capability to effectively promote and protect refugee rights.

This study found that NHRIs in South Africa and Kenya have played a significant role in the promotion and protection of refugee rights through demanding accountability for the realisation of these rights at both domestic and international levels. The evidence presented indicated that those NHRIs with the broadest mandates had the highest level of engagement

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<sup>159</sup> Richard Carver, “Refugees and NHRIs,” 221.

with refugee rights. Thus, in South Africa, while all three NHRIs included in the study have engaged in varying levels with refugee rights promotion and protection, the SAHRC's engagement is more extensive. This ranged from reporting, investigations, litigation, submissions on policy and legislation, advocacy through awareness raising activities and direct engagement with relevant government actors. In Kenya, there was limited evidence to indicate that besides the KNCHR, the other two NHRIs included in this study had engaged with refugee rights promotion and protection. The activities that the KNCHR undertook primarily related to the protection of refugee rights and included litigation, investigations into police misconduct, unlawful and arbitrary detention, and complaints handling.

Furthermore, the study found that the NHRIs that had engaged with refugee rights did not limit their activities to either promotion or protection but utilised the breadth of their mandates to broadly address refugee rights. This was more apparent in the South African context where all three NHRIs had conducted promotion and protection activities. In Kenya, though the Gender Commission participated in UNHCR workshops, it was not apparent what the nature of the workshops was. However, the KNCHR's activities were both protection and promotion related as indicated above. The promotion activities included raising awareness about refugee rights, its role with respect to the promotion and protection of these rights and submissions on relevant policy and legislation.

This study has also demonstrated that there are operational and contextual factors that impede the NHRIs' capacity and capability to effectively advance refugee rights, but that these challenges and barriers could be circumvented through adaptation and liberal interpretation of their human rights mandate. The operational and contextual factors identified in South Africa and Kenya were similar, but their manifestations differed. In South Africa, an urban refugee policy prevails, and refugees are allowed to integrate locally. The South African government implements the refugee status determination process, but the

implementation is beleaguered with challenges. These include maladministration, corruption, poor access to basic services and xenophobia. Thus, the NHRIs' activities have generally focused on addressing these issues, but there has been limited emphasis on addressing the systemic challenges that the refugee protection regime faces. In addition, despite the opportunities for collaboration, the NHRIs tend to operate in isolation of each other.

In Kenya, the refugee policy has evolved from an urban policy that emphasised local integration to one that has become increasingly restrictive and highly securitised. Kenya employs an encampment policy with limited freedom of movement for refugees and asylum seekers. Unlike, South Africa, most refugees are considered *prima facie* refugees and status determination is usually pursued where resettlement to a third country is considered. Until, 2011, the UNHCR implemented the refugee policy with limited direct involvement from the Kenyan government. The result was that the parameters for engagement with the refugee regime were defined by the UNHCR. These were favourable to some but not all stakeholders, as those not identified as UNHCR's implementing partners operated on the margins of the refugee protection regime. It is within this peripheral zone that the NHRIs fall.

Therefore, the NHRIs in Kenya operate within a context that has not been formally defined a role for their engagement, despite the recognition by the UNHCR that NHRIs have a role to play in ensuring the protection of refugee rights. In addition, the securitisation of asylum in Kenya has further curtailed the NHRIs' capacity to engage with refugee rights. The Kenyan government increasingly views asylum through a terrorism lens especially where Somali refugees and asylum seekers are concerned. Asylum is thus viewed as a national security matter and not a humanitarian or human rights concern. Despite these contextual limitations, the KNCHR has engaged substantively with refugee rights promotion and protection. The other NHRIs included in the study have not. The KNCHR has adopted a public interest litigation strategy where refugee rights violations occur, which have included



challenging *refoulement*, the encampment policy, and arbitrary and illegal detention of refugees and asylum seekers.

Other operational challenges that some of the NHRIs face included resource constraints, inadequate specialist expertise on refugee law, effective reporting to influence change and the absence of strategic collaboration amongst the NHRIs and other stakeholders on refugee rights promotion and protection. The study also identified ways through which the challenges and barriers could be overcome. These included building relationships with rights' holders and other stakeholders such as CSOs, other NHRIs, and regional human rights mechanisms and processes. The opportunities at the regional level, which are under explored, are of particular importance for NHRIs. Recent developments, including the development of guidelines for NHRIs for follow up on the implementation of the decisions of the African Commission, the revision of the African Commission's rules of procedure and the resolution granting affiliate status to NHRIs to include specialised NHRIs and ombudsman institutions, offer additional avenues for enhanced engagement at the regional level.

## **8.2 Main conclusions**

The following conclusions are drawn based on the findings of this study.

### **8.2.1 NHRIs have the capacity and capability to promote and protect refugee rights and do not require an explicit refugee rights' mandate to do so**

This study found that the primary NHRIs in South Africa and Kenya have contributed to the development of a domestic refugee protection regime compliant with international norms and standards. The lack of an explicit reference, within their mandates, to promote refugee rights has not hampered the NHRIs' efforts in dealing with these rights. The NHRIs have also sought accountability, through domestic channels and at the international levels, where South

Africa and Kenya failed to meet their obligations to ensure access to rights for refugees and asylum seekers.

Therefore, NHRIs can act as facilitators for the diffusion of international norms and standards at the domestic level. In addition, the NHRIs' promotion and protection mandates prescribed by the Paris Principles provide sufficient means to effectively contribute to the advancement of refugee rights. NHRIs do not require an express mandate to promote and protect refugee rights, nor do they need to reinterpret their mandates to deal with refugee rights. In fact, in their activities, none of the NHRIs in this study that had engaged with refugee rights delineated international human rights norms and standards from international refugee law norms and standards. Their activities were undertaken because of interpreting their mandate "to promote and to protect" to include the human rights of all persons within the country regardless of their status. This implies that the NHRIs have adopted in practice an approach to refugee rights promotion and protection in line with Chetail's argument that the interactions between the two fields of international law "have become so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other."<sup>160</sup>

However, the lack of an explicit mandate has perhaps justified the intrusion by the State in the refugee rights' work that the NHRIs undertake, especially in Kenya where 'aliens' generally fall under the national security sphere. The SAHRC has also faced questions in Parliament about why it engages with refugees and asylum seekers. Scholarship has also shown that where an NHRI has an explicit mandate to promote the realisation of socio-economic rights, the NHRI displays a greater commitment to promoting such rights and dedicates significant resources to do so with positive results. A survey on NHRIs and migrants rights showed that a significant number of NHRIs across the globe were engaged

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<sup>160</sup> Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law," in Ruth Rubio Human Rights and Immigration, Oxford: Oxford University Press, 2014: 68 (pp 19-72)

with migrants' rights (including refugee rights).<sup>161</sup> The results from the survey also noted that the primary reason for the lack of NHRI engagement with any category of migrants' rights was the lack of an explicit mandate to do so.

The findings from this study provide the basis for a different assertion. They indicate that a broad human rights mandate provides leeway for an NHRI to interpret its mandate broadly to include engagement with rights not explicit within its mandate. Therefore, the lack of an explicit mandate does not necessarily limit an NHRI's capacity and capability to promote and protect refugee rights. Notwithstanding the challenges faced, as stated above, the SAHRC and the KNCHR have argued that the constitutional imperative to protect the rights of all persons provides sufficient basis to engage with refugee rights' promotion and protection.

However, ensuring effectiveness of such engagement requires consideration of various other factors, key among which is expertise in refugee law. The interconnectedness between the two branches of international law requires that NHRIs build expertise on refugee law and mainstream this into practice. The importance lies in the fact that the challenges with accessing refugee rights arise primarily during the refugee status determination process and the subsequent access to rights that the status determination provides. In addition, the UNHCR has tended to engage primarily with stakeholders with refugee rights' expertise to the exclusion of those with the general human rights remit.

As such, the peer review process that NHRIs are periodically subjected to, when establishing compliance with the Paris Principles, might be the opportunity to urge NHRIs to engage with refugee rights. This could comprise recommendations to interpret mandates broadly in line with the Paris Principles' requirement that NHRIs pay due regard to the rights of refugees and other groups deemed vulnerable to human rights violations. Another avenue

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<sup>161</sup> See this thesis chapter 1, notes 101-102; chapter 2, note 76; chapter 6 notes 273-274

to encourage this could be through the regional African NHRI network-NANHRI. The NANHRI's primary mandate is NHRI capacity building for effective delivery on their mandates. While there is a regional programme being implemented through the NANHRI, this is a broad migration-based programme with limited integration of refugee rights issues.

The scope of NANHRI's work on migration could be expanded to include promotion of refugee rights' specific activities for NHRIs. These could be drawn from those agreed to by NHRIs as reflected in the Kigali Declaration on the Role of NHRIs in the Protection of Refugees, IDPs and Stateless Persons (see discussion in Chapter 3). The Kigali Declaration sets out ambitious activities for NHRIs to implement efforts to enhance the realisation of refugee rights ranging from enhancing early warning systems for conflict prevention to promotion of refugee rights and preventing non-refoulement. Though ambitious, the activities are specific and can be integrated into the activities that NHRIs already undertake.

Therefore, while the thesis concludes that NHRIs have the capacity and capability to engage with refugee rights even in the absence of an explicit mandate to do so, it is acknowledged that a more nuanced role for NHRIs within the refugee protection regime, must be accompanied by efforts to ensure that NHRIs have a clear understanding of refugee rights and what the promotion and protection of these rights entails.

### **8.2.2 The extent of NHRI engagement with refugee rights varies based on how broad or narrow its human rights mandate is**

This study found that the NHRIs with a broad promotion and protection mandate display a higher level of engagement with refugee rights' promotion and protection. These were the NHRIs fully compliant with the Paris Principles i.e. the SAHRC and the KNCHR. The specialised NHRIs in South Africa displayed significantly lower levels of engagement with refugee rights while those in Kenya were absent from the refugee protection regime.

It is therefore important that NHRIs with the broad mandates are identified as the key accountability mechanisms as their mandates grant them wider scope for engagement. However, due regard must be given to the role of NHRIs with specialised mandates, such as the gender commissions and the ombudsman institutions, because their mandates provide for nuanced attention to the rights of those refugees and asylum seekers with higher levels of vulnerability to violence, exploitation and discrimination, and addressing corruption and maladministration in the asylum system. The role of specialised NHRIs is increasingly being explored, including within the context of the promotion and protection of refugee rights. For instance, Carver's assessment of NHRIs and protection of refugee rights in the Balkans provides important evidence of the impact that such institutions can have on the ground. The NHRIs included in his assessment were Ombudsman institutions with a human rights mandate.

Furthermore, the recent amendments to the African Commission's working methods reflect the growing recognition that NHRIs with narrow mandates can contribute to the advancement of human rights in the region. The African Commission amended its rules of procedure and adopted a resolution granting NHRIs affiliate status, which included specialised human rights institutions. These institutions can now participate in the African Commission's work and play a role in influencing the States' duty to implement their human rights obligations.

Additionally, the GANHRI increasingly requests ombudsman institutions to interact with the UN human rights mechanisms and processes even where the institution does not have the explicit responsibility to do so.<sup>162</sup> Devenish et al, have also identified specific ways through which ombudsman institutions can protect the rights of refugees and other persons

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<sup>162</sup> Linda C. Reif, "Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations," in Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (2d ed., Brill, 2020)

who are displaced or stateless.<sup>163</sup> These included conducting refugee rights awareness activities, addressing systemic failures within the asylum systems, supporting other NHRIs and building effective referral mechanisms and partnership between the Ombudsman and other stakeholders working with refugees, asylum seekers and IDPs.

While these developments have focused on the ombudsman institutions, the arguments for engagement equally apply to the gender commissions as their remit for gender equality is crosscutting. In addition, there are specific aspects of the asylum experience that necessitate the specialist expertise that resides in gender commissions. The gendered aspects of asylum are not often addressed and refugees and asylum seekers who face heightened vulnerabilities based on gender exist in a precarious situation. Therefore, the NHRIs, regardless of scope of mandate can work collaboratively to develop strategic methods for engagement with refugee rights promotion and protection.

One of the thesis' key findings was that limited collaboration among the NHRIs played a role in the absence of a strategic approach to addressing refugee rights. The study also found that many of the refugee rights' violations faced by refugees stemmed from systemic issues including corruption, maladministration, and xenophobia. Studies have shown that NHRIs have the capacity to influence State compliance with international human rights norms especially where they challenge systemic human rights violations.<sup>164</sup> Evidence further suggests that an inquiry as an NHRI methodology for accountability is perhaps the most useful means to address systemic human rights violations.<sup>165</sup> Thus, taking the above two findings into account, the NHRIs could utilise the broad range of their powers to implement joint strategic interventions for instance through inquiries to address the systemic issues that affect the realisation of refugee rights.

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<sup>163</sup> Annie Devenish, Arlene Brock, Franky Lwelela and Marion Adoni, "Role of Ombudsman,"

<sup>164</sup> Sonia Cardenas, *Chains of Justice*; Megan Brodie, "Law, Change and Socialisation: Constructing and Account of the Role of NHRIs in Addressing Systemic Human Rights Violations: A Case Study of National Inquiries Conducted by NHRIs across the Asia-Pacific Region," (PhD Thesis, University of Melbourne, 2017),

<sup>165</sup> Megan Brodie, "Law, Change and Socialisation."

Stronger institutional links among the various categories of NHRIs could also foster the development of better approaches to addressing the rights of refugees and asylum seekers who are marginalised or vulnerable to violence, exploitation, and discrimination. For instance, adopting an intersectional approach to human rights work would allow for critical assessment of the situation of invisible or marginalised groups without, as Fiddian-Qasmiyeh asserts, “creating or reproducing hierarchies of vulnerability.”<sup>166</sup>

### **8.2.3 NHRIs face challenges and barriers that impact on their responsibility to effectively promote and protect refugee rights**

This study identified specific challenges and barriers that had a negative impact on the NHRIs’ engagement with refugee rights promotion and protection. Firstly, the NHRIs have not adopted a coherent approach to address refugee rights even where an NHRI has defined such rights as priority rights. While the NHRIs in this study acknowledged significant implementation and protection gaps related to the promotion and protection of refugee rights, this did not guarantee that an effective approach would be utilised to address these rights. The implementation of activities related to advancing refugee rights remained peripheral to other NHRI activities. In addition, the approach utilised was broad, focusing on migrants and not necessarily on refugees and asylum seekers. Such a broad approach does not address the problem posed by the conflation of migrants (economic, undocumented) and refugees and asylum seekers who meet a specific legal definition as provided by national, regional, and international refugee law.

Secondly, NHRIs face considerable contextual impediments to effectively engage with the State on asylum matters. This study showed that while the refugee protection frameworks in place in South Africa and Kenya meet the minimum international norms and

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<sup>166</sup> Elena Fiddian-Qasmiyeh, Presentation to the UNHCR High Commissioner’s Dialogue on Protection Challenges: Panel 1, Session 1 on Reception and Admission, Geneva 2017.

standards, the enjoyment of rights had been curtailed by several contextual factors. These factors have in turn influenced the nature of and degree to which the NHRIs address refugee rights. The NHRIs in this study displayed a high level of willingness to address refugee rights even where circumstances were difficult. The securitisation of asylum, high levels of xenophobia and a general lack of political will have hampered NHRI efforts but have not prevented the NHRIs from demanding accountability.

Lastly, there is a dearth of research on NHRIs and their contribution to the promotion and protection of refugee rights. This is compounded with the fact that NHRIs generally lack adequate documentation and knowledge management systems to accurately capture the breadth of the activities that they undertake generally but specifically on the rights of refugees and asylum seekers and other categories of migrants. While there is evidence of their role in the adoption of non-restrictive domestic refugee protection frameworks, it is difficult to ascertain the impact they have had on the overall realisation of refugee rights. It is certainly evident from the findings that the skewed reliance on CSOs for the promotion and protection of refugee rights points to the need for NHRIs to heighten their role within the refugee protection regime.

#### **8.2.4 There are opportunities available for NHRIs to enhance their capacity to effectively promote and protect refugee rights**

The findings from this study indicate that there are avenues through which NHRIs could enhance their capacity to effectively promote and protect refugee rights. One important area would be building a relationship with the UNHCR at both the domestic and international levels. There is currently no recommended process for formal engagement with the UNHCR at either the domestic or international levels. The anecdotal evidence of the impact of the enhanced relationship between NHRIs and UN treaty bodies on accountability for human rights violations, lends itself to the need for a conceptualisation of a similar relationship with



the UNHCR, as the custodian of the 1951 Refugee Convention. This would contribute to the development of norms for NHRI engagement within the international refugee protection regime.

The UNHCR is also the vehicle through which developments within the international refugee protection regime are channelled. In this regard, the UNHCR has played the pivotal role in implementing the New York Declaration for refugees and migrants and the resultant Global Compacts. The Global Compacts on Refugees and Migration processes offer another avenue to create a normative framework for NHRI engagement with refugee rights. As discussed in this thesis in chapters 1, 6 and 7, NHRI involvement in these processes is weighted in favour of the promotion and protection of migrants' rights and not refugee rights. This is perhaps due to the fact that NHRIs' role in realising migrants' rights is recognised expressly within the Global Compact for Migration and the resultant implementation processes have proceeded in line with this recognition.

In theory, the lack of recognition of NHRIs within the Global Compact on Refugees processes should not hinder the NHRIs from engaging with these rights, as the underlying principle in the implementation of the Compact is "multi-stakeholder cooperation and partnerships."<sup>167</sup> However, the evolving practice indicates otherwise, and there is a risk that promotion and protection of migrants' rights will overshadow the promotion and protection of refugee rights. Thus, NHRIs need to promote the adoption of a complementary approach in the implementation of the Compacts, at least to attempt to create a normative framework for NHRI engagement with refugee rights at the international level.

The NHRI networks at sub-regional, regional, cross-regional and international levels have been identified as avenues through which good practice can be shared, adapted and implemented. For instance, the East African NHRIs are utilising the East African NHRI

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<sup>167</sup> United Nations, "Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees," A/73/12 (Part II), [https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf) (GCR), paragraph 7 and section 3.2.

network as the platform to contribute to the regional policy on refugee management. The African NHRIs' also set out specific activities that they ought to undertake following the adoption of the Kigali Declaration on refugees, IDPs and statelessness. There has not been any reported follow-up on these activities, yet their implementation would also foster the creation of a normative framework for NHRI engagement with these rights at the regional level. In addition, the AU's mechanism and processes related to refugee rights are available to NHRIs.

The ACHPR and its mechanisms and processes offer some of the most viable avenues for engagement for refugee rights promotion and protection. There have been commendable efforts made to include African NHRIs within its processes and mechanisms. These avenues can be explored to encourage NHRIs to develop coherence in addressing refugee rights including in determining modalities for engagement with the regional human rights system with respect to refugee rights. In this regard, building partnerships with the African Commission's Special Rapporteur on the Rights of Refugees, Asylum Seekers, Internally Displaced Persons and Migrants would be imperative to enhance NHRIs' role in the promotion and protection of refugee rights.

At the domestic level, credible CSOs, many which have closer ties with refugees and asylum seekers, could serve important roles in enhancing the NHRIs' visibility among rights holders and complement the NHRIs' capacity to address refugee rights.

### **8.3 Recommendations for further research**

This study found that NHRIs are engaging with refugee rights to a degree that justifies their role as important actors in bridging implementation and protection gaps. These findings are however limited to NHRIs in South Africa and Kenya and cannot be ascribed to all NHRIs beyond those included in this study. Further evaluation research is needed that would quantitatively assess the performance and impact of NHRIs within the refugee protection

regime and their efficiency as accountability mechanisms. Carver's proposed framework for measuring NHRI effectiveness may be useful in developing a tool to undertake research that would expand the scope of this study.<sup>168</sup> Such evidence would provide a strong basis to support the argument for the inclusion of NHRIs as key actors within the refugee protection regime.

In addition, the findings highlighted that there was limited attention given to refugees and asylum seekers who were especially vulnerable to discrimination, exploitation and violence including women, children and sexual minorities. Therefore, further research on the role that NHRIs could play in the application of an intersectional approach to promoting and protecting the rights of such particularly vulnerable groups within the refugee and asylum seeker categories is necessary. This could build on emerging research on the intersectionality between refugee status and various forms of vulnerability such as the work of LaViolette.<sup>169</sup>

The relationship between NHRIs and the courts also warrants further research. As Dauvergne states, few international legal texts are interpreted more frequently at the domestic level than the Refugee Conventions.<sup>170</sup> There is an abundance of jurisprudence, across the globe, with respect to refugee law.<sup>171</sup> As this study has found, NHRIs are utilising their litigation powers to seek remedies from the courts, where refugee rights violations occur. They also serve as *amicus curiae* and provide legal advice or referrals for legal aid where victims of human rights violations choose to access courts for remedies.

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<sup>168</sup> Richard Carver, *Measuring The Impact And Development Effectiveness Of National Human Rights Institutions: A Proposed Framework For Evaluation*

<sup>169</sup> Nicole LaViolette, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary," *International Journal of Refugee Law* 22, no.2 (2010): 173-208; Dina Taha, "Intersectionality and Other Critical Approaches in Refugee Research: An Annotated Bibliography," *Local Engagement Refugee Research Network Paper*, no. 3 (December 2019): 1-29- Taha provides a comprehensive bibliography on other related works on the utilisation of intersectionality in refugee research.

<sup>170</sup> Catherine Dauvergne, "Refugee Law in Perpetual Crisis," in *Contemporary Issues in Refugee Law* edited by Satvinder Singh Juss and Colin Harvey, (Cheltenham: Edward Elgar Publishing Limited, 2013): 22-23, DOI: <https://doi.org/10.4337/9781782547662>

<sup>171</sup> See for instance Refworld, hosted by the UNHCR, which has a comprehensive database of decisions from judicial bodies from across the globe. [https://www.refworld.org/type\\_CASELAW,,,,,0.html](https://www.refworld.org/type_CASELAW,,,,,0.html)

This study highlighted the impact that NHRIs had in the cases that they initiated. In South Africa, the SAHRC's intervention led to the eradication of the practice of detaining refugees and asylum seekers at the Lindela immigration detention facility. In Kenya, the KNCHR successfully challenged the constitutionality of the encampment policy and prevented refugees and asylum seekers from refoulement. There are, however, limited studies on NHRIs and their interactions with the courts - only one journal article was identified on this subject.<sup>172</sup> NHRIs and the courts play a role in the implementation of human rights and serve complementary roles in this regard. A simplistic view of the interaction between the NHRIs and the courts, based on this study's findings would be misguided, hence the need to consider further research on the subject. This would take into consideration for instance, the types of interactions that occur between the institutions with respect to refugee rights or the influence that the NHRIs and the courts can have in the realisation of refugee rights – i.e. in assessing their role in diffusing and domesticating refugee rights norms and standards.

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<sup>172</sup> Andrew Wolman, "National Human Rights Institutions and the Courts in Asia-Pacific Region," *Asia Pacific Law Review* 19, no. 2 (2011): 237-252; C. Raj Kumar, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights," *American University International Law Review* 19, no. 2 (2003): 293-296- Kumar captures aspects of this subject in his article.

## BIBLIOGRAPHY

- Abuya, Edwin Odhiambo. "Past Reflections Future Insights: African Asylum Law and Policy in Historical Perspective." *International Journal of Refugee Law* 19, no. 1 (March 2007): 51-95. <https://doi.org/10.1093/ijrl/eem006>.
- Achiume, E. Tendayi. "Beyond Prejudice: Structural Xenophobic Discrimination against Refugees." *Georgetown Journal of International Law* 45, no. 2 (2014): 323-382.
- Ad Hoc Committee on the Commission for Gender Equality Forensic Investigation, *Report of the Ad Hoc Committee on the Commission for Gender Equality (CGE) Forensic Investigations, dated 19 April 2011*.
- Adler, Emanuel. <http://internationalrelations.org>. Accessed 4 April 2018, [http://internationalrelations.org/constructivism\\_in\\_international\\_relations/](http://internationalrelations.org/constructivism_in_international_relations/)
- Adler, Emanuel. "Seizing the Middle Ground: Constructivism in World Politics." *European Journal of International Relations* 3, no. 3 (1998): 319-363.
- Adnan, Mohd Hamdan. "Refugee Issues in Malaysia: The Need for a Proactive, Human Rights Based Solution." *Malaysian Journal on Human Rights*, 6 (2012): 24-31.
- Addaney, Michael. "Moving the Debate Forward: Securing the Rights of Refugees Under the African Human Rights System." In *Ghana @ 60: Governance and Human Rights in Twenty-First Century Africa*, edited by Michael Addaney and Michael Gyan Nyarko, 278-295. Pretoria: Pretoria University Law Press, 2017.
- African Ombudsman and Mediators Association (AOMA), Draft Report of the Regional Colloquium of African Ombudsmen on Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions, Nairobi, 19-21 September 2013 [http://aoma.ukzn.ac.za/Libraries/External\\_reports/Kenya\\_Draft\\_Report\\_of\\_the\\_Regional\\_Colloquium\\_of\\_African\\_Ombudsmen.sflb.ashx](http://aoma.ukzn.ac.za/Libraries/External_reports/Kenya_Draft_Report_of_the_Regional_Colloquium_of_African_Ombudsmen.sflb.ashx).
- Aichele, Valentin. "National Human Rights Institutions." In *The SAGE Handbook of Human Rights: Two Volume Set Vol 2*, edited by Anja Mihr and Mark Gibney, 691-708. London: SAGE Publications, 2014.
- Alfaro-Velcamp, Theresa and Mark Shaw. "Please GO HOME and BUILD Africa": Criminalising Immigrants in South Africa." *Journal of Southern African Studies* 42, no.5 (2016): 983-998. doi: [10.1080/03057070.2016.1211805](https://doi.org/10.1080/03057070.2016.1211805).
- Amaya-Castro, Juan M. "International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis." *Netherlands Yearbook of International Law* 44 (December 2013): 65-88. [https://doi.org/10.1007/978-94-6265-011-4\\_4](https://doi.org/10.1007/978-94-6265-011-4_4).
- Amit, Roni. *Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System*. Johannesburg: Lawyers for Human Rights & African Centre for Migration & Society, 2015.
- Amit, Roni and Norma Kriger. "Making migrants 'il-legible': The Policies and Practices of

- Documentation in Post-apartheid South Africa. *Kronos*, 40 no.1 (November, 2014). [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0259-01902014000100012](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-01902014000100012).
- Amit, Roni. *No Way In: Barriers to Access Services and Administrative Justice at South Africa's Refugee Reception Offices*. Johannesburg: African Centre for Migration & Society, 2012.
- Amnesty International. *Kenya: Crackdown on Irregular Migrants Risks Sparking Xenophobia*, 1 September 2018. Accessed 8 September 2018. <https://www.amnesty.org/en/latest/news/2018/09/kenya-crackdown-on-irregular-migrants-risks-sparking-xenophobia/>.
- Amnesty International. *Not Time To Go Home: Unsustainable Returns of Refugees to Somalia*. London: Amnesty International, 2017.
- Anker, Deborah E. "Refugee Law, Gender, and the Human Rights Paradigm." *Harvard Human Rights Journal* 15 (2002): 133-154. <http://nrs.harvard.edu/urn-3:HUL.InstRepos:11357476>.
- Arenilla, Shirley Llian. "Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States." *Anuario Mexicano de Derecho Internacional* 15, Issue 1 (2015): 283-322. <https://doi.org/10.1016/j.amdi.2014.09.005>.
- Asia Pacific Forum. *Fact Sheet 3: The importance of independence*. Accessed 20 December 2019. <https://www.asiapacificforum.net/support/what-are-nhris/independence/>
- Association for the Prevention of Torture. *The Role of National Human Rights Institutions in the Prevention of Torture and Cruel, Inhuman and Degrading Treatment or Punishment*. Accessed January 28, 2018. [https://www.ap.t.ch/content/files\\_res/nhri-position-paper.pdf](https://www.ap.t.ch/content/files_res/nhri-position-paper.pdf).
- Ayega, Davis. "Human rights bodies differ on proposed merger." *CapitalNews*, May 8, 2018, <https://www.capitalfm.co.ke/news/2018/05/human-rights-bodies-differ-proposed-merger/>.
- Ayiera, Eva. "Bold Advocacy Finally Strengthens Refugee Protection in Kenya." *Forced Migration Review* 28, (2007): 26-27.
- Azarian, Reza. "Potentials and Limitations of Comparative Method in Social Science." *International Journal of Humanities and Social Science*, 1, no. 4 (April 2011): 113-125. [http://www.ijhssnet.com/journals/Vol.\\_1\\_No.\\_4;\\_April\\_2011/15.pdf](http://www.ijhssnet.com/journals/Vol._1_No._4;_April_2011/15.pdf).
- Babbie, Earl and Johann Mouton. *The Practice of Social Research*. Cape Town: Oxford University Press, 2001.
- Bakker, Gina. "The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System." *African Human Rights Law Journal*, 13 (2013): 1-29.

- Barbelet, Veronique Jessica Hagen-Zanker, and Dina Mansour-Ille. *The Jordan Compact: Lessons Learnt and Implications for Future Refugee Compacts*, Feb 2018. <https://www.odi.org/publications/11045-jordan-compact-lessons-learnt-and-implications-future-refugee-compacts>.
- Barkow, Rachel E. "Insulating Agencies: Avoiding Capture through Institutional Design." *Texas Law Review* 89 (December 2010): 15-79.
- Bartolomei, Linda Eileen Pittaway and Emma Elizabeth Pittaway. "Who Am I? Identity and Citizenship in Kakuma Refugee Camp in Northern Kenya." *Development* 46, no.3 (September 2003): 87-93. <https://doi.org/10.1177/10116370030463014>.
- Barutciski, Michael. "The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)." *International Journal of Refugee Law*, 8, 1/2 (January, 1996): 49-110. <https://doi.org/10.1093/ijrl/8.1-2.49>.
- Barutciski, Michael. "The Limits to UNHCR's Supervisory Role." In *The UNHCR and the Supervision of International Refugee Law*, edited by James Simeon, 59-74. Cambridge: Cambridge University Press, 2013.
- Beauchamp, Tom L. and James F. Childress. *Principles of Biomedical Ethics*, 8th edition. Oxford: Oxford University Press, 2019.
- Berry, Stephanie E. *Mainstreaming a Minority Rights-based Approach to Refugee and Migrant Communities in Europe*, 2017. Accessed 8 September, 2019. [https://minorityrights.org/wp-content/uploads/2017/12/MRG\\_Rep\\_MStream\\_CMC\\_FINAL.pdf](https://minorityrights.org/wp-content/uploads/2017/12/MRG_Rep_MStream_CMC_FINAL.pdf).
- Berry, Stephanie E. "Integrating Refugees: The Case for a Minority Rights Based Approach." *International Journal of Refugee Law* 24, no.1 (February 2012): 1-36 <https://doi.org/10.1093/ijrl/eer038>.
- Betts, Alexander and James Milner. "Governance of the Global Refugee Regime." *World Refugee Council Research Paper*, no. 13 (May 2019): 1-16.
- Betts, Alexander. "Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants." *International Journal of Refugee Law* 22, no. 2 (2010): 209-236. <https://doi.org/10.1093/ijrl/eeq018>
- Beyani, Chaloka. "The Role of Human Rights Bodies in Protecting Refugees." In *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* edited by Anne Fruma Bayefsky, 269 -281. Leiden: Martinus Nijhoff Brill, 2006.
- Bloch, A. "The Right to Rights? Undocumented Migrants from Zimbabwe Living in South Africa." *Sociology* 44, no.2 (2010): 233-250.
- Bouyat, Jeanne and Rodolphe Demeestre. *The Institutionalization of Xenophobia in the*

- contemporary South African State Officials' practices towards African Immigration in high schools of Johannesburg and police stations of Cape Town*, (Seminar presentation, 12 June 2016, Paris France). Accessed 20 November, 2019.  
<http://www.ifas.org.za/research/2016/the-institutionalization-of-xenophobia-in-the-contemporary-south-african-state/>.
- Braun, Virginia and Victoria Clarke. "Using Thematic Analysis in Psychology. Accessed 25 June 2020, [https://uwe-repository.worktribe.com/preview/1043068/thematic\\_analysis\\_revised\\_-\\_final.pdf](https://uwe-repository.worktribe.com/preview/1043068/thematic_analysis_revised_-_final.pdf).
- Breen, Duncan and Yiftach Millo. "Protection in the City: Some Good Practice in Nairobi." *Sexual Orientation and Gender Identity and the Protection of Forced Migrants*, *Forced Migration Review*, no. 42 (April 2013): 54-56.
- Brodie, Megan. "Law, Change and Socialisation: Constructing and Account of the Role of NHRIs in Addressing Systemic Human Rights Violations: A Case Study of National Inquiries Conducted by NHRIs across the Asia-Pacific Region." PhD Thesis, University of Melbourne, 2017.
- Buhl, Dana. *Ripple in Still Water: Reflections by Activists on Local and National-Level Work on Economic, Social and Cultural Rights: Monitoring*, Institute of International Education: Washington, DC, 1996. Accessed 12 August 2020.  
<http://hrlibrary.umn.edu/edumat/IHRIP/ripple/chapter4.html#whatmonitor>.
- Burdekin, Brian. "The Role of National Inquiries in the Protection of Social and Economic Rights." In *National Human Rights Institutions and Economic Social and Cultural Rights* edited by Eva Brems, Gauthier de Beco and Wouter Vandenhoe, 181-#. Cambridge: Intersentia, 2013.
- Business Daily*. "Uhuru Rejects Bill Giving Refugees Right to Jobs and Land." *Business Daily*, 8 November 2017.  
<https://www.businessdailyafrica.com/economy/Uhuru-rejects-bill-giving-refugees-right-to-jobs-and-land/3946234-4178936-xf36adz/index.html>
- Buzan, B., O. Waever, and J. de Wilde. *Security: A New Framework for Analysis*. Boulder: Lynne Rienner Publishers, 1998.
- Campbell, Elizabeth H. "Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration." *Journal of Refugee Studies* 19, no. 3 (September 2006): 96-413. <https://doi.org/10.1093/jrs/fel011>.
- Camminga, B. "Gender Refugees" in South Africa: The "Common-Sense" Paradox." *Africa Spectrum* 53, no. 1 (2018): 89-112.
- Cantor, David James and Stefania Eugenia Barichello. "The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?" *International Journal of Human Rights*, 17, Issue 5-6 (2013): 689-706.  
<https://doi.org/10.1080/13642987.2013.825077>.



- Carbado, Devon W., Kimberlé Williams Crenshaw, Vickie M. Mays, and Barbara Tomlinson. "Intersectionality: Mapping the Movements of a Theory." *Du Bois Review* Vol. 10, no. 2 (2013): 303–312. <https://doi.org/10.1017/S1742058X13000349>.
- Carciotto, Sergio and Mike Mavura, *The Evolution of Migration Policy in Post-Apartheid South Africa: Emerging Themes And New Challenges*. Cape Town: The Scalabrini Institute for Human Mobility in Africa (SIHMA), 2016.
- Cardenas, Sonia. *Chains of Justice: The Global Rise of State Institutions for Human Rights*. Pennsylvania: University of Pennsylvania Press, 2014.
- Cardenas, Sonia. "NHRIs and Compliance." In *Human Rights, State Conformity and Social Change: Assessing National Human Rights Institutions*, edited by Ryan Goodman and Thomas Pogram, 29-51. Cambridge: Cambridge University Press, 2012.
- Cardenas, Sonia. "Emerging Global Actors: The United Nations and National Human Rights Institutions." *Global Governance* 9, no. 1 (Jan.–Mar. 2003): 23-42.
- Carver, Richard. "Refugees and National Human Rights Institutions: A Growing Engagement." *Journal of Human Rights Practice* 9 (2017): 216–222. doi: 10.1093/jhuman/hux017.
- Carver, Richard. *Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework For Evaluation*. Bratislava: UNDP, 2014.
- Carver, Richard. "National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law." In *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* edited by Ryan Goodman and Thomas Pogram, 181-209. Cambridge: Cambridge University Press, 2012.
- Carver, Richard. "One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? Lessons from the European Experience." *Journal of Human Rights Practice* 3, no.11 (March 2011): 1-24.
- Carver, Richard. "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law." *Human Rights Law Review* 10, no. 1 (2010): 1-32.
- Carver, Richard and Alexey Korotaev. *Assessing the Effectiveness of National Human Rights Institutions*, October 2007.
- Centre for Conflict Resolution. *National Human Rights Institutions, Conflict Management and Peace building in Africa: Technical Seminar Report*, 2004. Accessed May 7, 2018. [http://www.operationspaix.net/DATA/DOCUMENT/5760~v~Seminar\\_Report\\_National\\_Human\\_Rights\\_Institutions\\_Conflict\\_Management\\_and\\_Peacebuilding\\_in\\_Africa.pdf](http://www.operationspaix.net/DATA/DOCUMENT/5760~v~Seminar_Report_National_Human_Rights_Institutions_Conflict_Management_and_Peacebuilding_in_Africa.pdf).
- Centre for Human Rights. *A Guide to the African Human Rights System*. Pretoria: Pretoria

- University Law Press, 2016.
- Center for Social Research Methods. *Ethics in Research*. Accessed 13 November, 2019. <https://socialresearchmethods.net/kb/ethics.php>.
- Chayes, Abram, and Antonia Handler Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, 1995.
- Chesoni, Atsango, Salome Muigai and Karuti Kanyinga. *Promoting Women's Human Rights and Enhancing Gender Equality in Kenya*. Stockholm: SIDA, 2006.
- Chetail, Vincent. "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law." In *Human Rights and Immigration* edited by Ruth Rubio-Marín, 19-72. Oxford: Oxford University Press, 2014.
- Chikalogwe, Victor. "A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa." Interview by Heinrich Boll Stiftung. 11 October 2018. <https://za.boell.org/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa>.
- Cho, Sumi, Kimberlé Williams Crenshaw and Leslie McCall. "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis." *Signs: Intersectionality: Theorizing Power, Empowering Theory* 38, No. 4, (Summer 2013): 785-810. <https://www.jstor.org/stable/10.1086/669608>.
- Citizen Reporter. "Home Affairs a Corrupt Hell for Refugees." Accessed July 6, 2018. <https://citizen.co.za/news/south-africa/1357923/home-affairs-a-corrupt-hell-for-refugees/>.
- Clare, Eli *Exile and Pride: Disability, Queerness and Pride*, (Durham: Duke University Press, 2015) cited in Ben Smith, "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective," *The Equal Rights Review*, 16 (2016): 73-102.
- Clarke, Victoria, and Virginia Braun. "Thematic Analysis." In *Encyclopedia of Quality of Life and Well-Being Research*, edited by A.C Michalos. Dordrecht: Springer, 2014.
- Clarke, Victoria and Virginia Braun. *Successful Qualitative Research: A Practical Guide for Beginners*. London: Sage, 2013.
- Cohen D., and Crabtree B. "Qualitative Research Guidelines Project." July 2006. Accessed June 23, 2017. <http://www.qualres.org/HomeTria-3692.html>.
- Collett, Elizabeth. "The Paradox of the EU-Turkey Refugee Deal." Accessed 25 January, 2018. <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>.
- Community Agency for Social Inquiry. 'National Refugee Baseline Survey: Final Report,' Researched for Japan International Cooperation Agency & United Nations

*High Commissioner for Refugees*, November 2003.

Commonwealth Ombudsman. *Better Practice Guide to Complaint Handling*. Canberra: Commonwealth Ombudsman, 2009.

Corkery, Allison. "National Human Rights Institutions." In *Ways and Means of Realizing Social and Economic Rights and Achieving the MDGs*. New York: CESR, 2011. <http://www.cesr.org/sites/default/files/WaysAndMeanscorkerychapter.pdf>.

Corkery, Allison. "The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law." *Australian International Law Journal*. 13 (2006): 97-127.

CoRMSA. *Protecting Refugees, Asylum Seekers and Immigrants in South Africa*. Johannesburg: CoRMSA, 2008. <http://www.cormsa.org.za/wp-content/uploads/2008/06/cormsa08-final.pdf>.

CoRMSA. *Refugee Protection in South Africa: Summary of Key Findings*. Johannesburg: CoRMSA, 2006.

Corruption Watch. *Asylum at a Price: How Corruption Impacts those Seeking Legal Protection in South Africa (Project Lokisa)*. Johannesburg: Corruption Watch, 2016. <https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/Project-Lokisa-revised-Pg16-22Nov20161.pdf>.

Costello, Cathryn, Yulia Ioffe and Teresa Büchsel. "Article 31 of the 1951 Convention Relating to the Status of Refugees." *Legal and Protection Policy Research Series*, July 2017.

Costello, Cathryn and Michelle Foster. "Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to Test." *Netherlands Yearbook of International Law Vol 46*, edited by Heijer M., van der Wilt, 273-327. T.M.C. Asser Press: The Hague, 2016. [https://doi.org/10.1007/978-94-6265-114-2\\_10](https://doi.org/10.1007/978-94-6265-114-2_10).

Crawford, James. "The UN Human Rights Treaty System: A System in Crisis" in *The Future of UN Human Rights Treaty Monitoring*, edited by Philip Alston and James Crawford. Cambridge: Cambridge University Press, 2000.

Crawley, Heaven. *Refugees and Gender: Law and Process*. Bristol: Jordon Publishing Ltd, 2001.

Crenshaw, Kimberlé. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *University of Chicago Legal Forum Volume 8*, Issue 1(1989): 139-167. <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

Crenshaw, Kimberlé Williams. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review* 43 (1991): 1241-1299.

Creswell, John H. *Research Design: Qualitative, Quantitative and Mixed Method*

*Approaches 4th edition*. Los Angeles: SAGE, 2014.

Crisp, Jeff. "Forced Displacement in Africa." *Refugee Survey Quarterly* 29, no. 3 (2010).

Crisp, Jeff. "The State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps." *African Affairs* 99 (2000): 601-632.

<http://afraf.oxfordjournals.org/content/99/397/601.abstract>.

Crisp, Jeff. *Mobilizing Political Will for Refugee Protection and Solutions: A Framework for Analysis and Action 2018*. Accessed 27 August, 2019.

<https://www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.1web.pdf>.

Crock, Mary, ed. *Refugees and Rights*. New York: Routledge, 2016.

Crush, Jonathan Godfrey Tawodzera, Cameron McCordic, Sujata Ramachandran and Robertson Tenge. *Refugee Entrepreneurial Economies in Urban South Africa* (2017) 783-819.

[https://sihma.org.za/wp-content/uploads/2017/09/2\\_Refugee-Entrepreneurial-Economies-in-Urban-South-Africa-min.pdf](https://sihma.org.za/wp-content/uploads/2017/09/2_Refugee-Entrepreneurial-Economies-in-Urban-South-Africa-min.pdf).

Crush, Jonathan and Godfrey Tawodzera, "Medical Xenophobia Zimbabwean Migrant Access to Public Health Services in South Africa," *Journal of Ethnic and Migration Studies* 40, no. 4 (April 2014). doi: [10.1080/1369183X.2013.830504](https://doi.org/10.1080/1369183X.2013.830504).

Crush, Jonathan, and Sujata Ramachandran. "Xenophobia, International Migration and Human Development." *Human Development Reports, Research Paper 2009/47* (2009): 1-104.

<https://pdfs.semanticscholar.org/eb20/18d333f82931128944ce1b11a6843de5fca4.pdf>.

Crush, Jonathan. "South Africa: Policy in the Face of Xenophobia." *Migration Policy Institute* 28 (2008). <http://www.migrationpolicy.org/article/south-africa-policy-facexenophobia>.

Cunliffe-Jones, Peter, and Julian Rademeyer. "Is South Africa the Largest Recipient of Asylum Seekers Worldwide?" *Africa Check*, 2015. Accessed June 5, 2018.

<https://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/>.

Dale, Amanda Barbara Allen. "Intersectional Human Rights at CEDAW: Promises, Transmissions and Impacts." PhD Thesis, York University, 2018.

D'Angelo, Ellen F. "Non-Refoulement: The Search for a Consistent Interpretation of Article 33." *Vanderbilt Journal of Transnational Law* 42, no. 1 (January 2009): 279-316.

Dauvergne, Catherine. "Refugee Law in Perpetual Crisis." In *Contemporary Issues in Refugee Law* edited by Satvinder Singh Juss and Colin Harvey, 13-30. Cheltenham: Edward Elgar Publishing Limited, 2013. DOI:

<https://doi.org/10.4337/9781782547662>

Davis, Aisha Nicole. "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage." *Harvard Human Rights Journal* 28 (2015): 205-242.

- de Beco, Gauthier. "Protecting the Invisible: An Intersectional Approach to International Human Rights Law." *Human Rights Law Review* 17, 2017: 633–663, doi: 10.1093/hrlr/ngx029
- de Beco, Gauthier, and Rachel Murray. *A Commentary on the Paris Principles on National Human Rights Institutions*. Cambridge: Cambridge University Press, 2015.
- De la Hunt, Lee Anne, and Kerfoot, William. "Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act." In *Advancing Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Anne de la Hunt, and Jonathan Klaaren, 89-116. New York: Berghahn Books, 2008.
- de Vos A.S., ed. *Research at Grassroots: For the Social Sciences and Human Service Professions 4<sup>th</sup> edition*. Pretoria: Van Schaik, 2011.
- Delcourt, Barbara. *Theory of Compliance*. Oxford: Oxford University Press, 2013.  
<http://opil.ouplaw.com>.
- Dennison, Susi, and Josef Janning. "Bear Any Burden: How EU Governments Can Manage the Refugee Crisis." *ECFR/167* (April 2016): 2-3. [http://www.ecfr.eu/page/-/Bear-Any-Burden\\_Dennison-Janning.pdf](http://www.ecfr.eu/page/-/Bear-Any-Burden_Dennison-Janning.pdf).
- Department of Justice and Correctional Services. *National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 2016-2021.
- DePoy, Elizabeth, and Laura Gitlin. "Research Ethics." In *Introduction to Research: Understanding and Applying Multiple Strategies*, 5<sup>th</sup> Edition. St Louis: Elsevier Inc., 2016. <https://doi.org/10.1016/B978-0-323-26171-5.00036-7>.
- DiMaggio, Paul J., and Walter Powell. *New Institutionalism in Organizational Analysis*, Chicago: Chicago University Press, 1991.
- d'Orsi, Cristiano. *The Right to Health for Refugees in South Africa: Concrete Reality or Wishful Thinking?* 13 December 2017. <https://africlaw.com/tag/xenophobia/>
- d'Orsi, Cristiano. *Asylum Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven*. New York: Routledge, 2016.
- Dinokopila, Bonolo Ramadi, and Rhoda Igweta Murangiri. "The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation." *African Journal of International and Comparative Law* 26, no. 2 (2018): 205-226.  
<https://doi.org/10.3366/ajicl.2018.0228>.
- Dinokopila, Bonolo Ramadi. "Beyond Paper-based Affiliate Status: National Human Rights Institutions and the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal* 10, no. 1 (2010): 26-52.
- Dubin, Martin David "Trans governmental Processes in the League of Nations," *International Organization* 37, Issue 3 (1983): 469-493

- Edwards, Alice. *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. Geneva: UNHCR, 2011.
- Edwards, Alice. "Overview on International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning." Presentation to the Canadian Council for Refugees, 26 July 2006. Amnesty International Index: POL 33/004/2006.
- ENCA. "Stateless Refugees Fear their Fate in Kenya." *ENCA*, 8 July 2016. <https://www.enca.com/africa/stateless-refugees-ponder-their-fate-in-kenya>
- Ensor, Linda "Constitutional Bodies Want to be included in State's Covid-19 Fight, *BusinessDay*, 17 May 2020. <https://www.businesslive.co.za/bd/national/2020-05-17-constitutional-bodies-want-to-be-included-in-states-covid-19-fight/>
- Feller, Erika. "International Refugee Protection 50 Years On: The Protection Challenges of the Past Present and Future." *IRRC* 83, 843 (2001): 581-605.
- Feller, Erika. "The Evolution of the International Refugee Protection Regime." *Journal of Law & Policy* 5 (2001): 129-139.
- Ferris, Elizabeth. "Protracted Refugee Situations, Human Rights and Civil Society." In *Protracted Refugee Situations: Political, Human Rights and Security Implications*, edited by Gil Loescher, James Milner, Edward Newman and Gary Troeller, 85-107. New York: United Nations University Press, 2008.
- Ficks, Thomas H. "The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa's Pariah-the Undocumented Immigrant." *Indiana Journal of Global Studies* 7, no. 1 (1999): 393-417. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1182&context=ijgls>
- Fiddian-Qasmiyeh, Elena. "Presentation to the UNHCR High Commissioner's Dialogue on Protection Challenges Panel 1, Session 1 on Reception and Admission." 2017 UNHCR High Commissioner's Dialogue, Geneva, 12-13 December 2017.
- Fiddian-Qasmiyeh, Elena. "Gender and Forced Migration." In *The Oxford Handbook of Refugee and Forced Migration Studies* edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, 395-408. Oxford: Oxford University Press, 2014
- Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 4, (Autumn 1998): 887-917. <http://www.jstor.org/stable/2601361>.
- Fitzmaurice, Peter. *Anniversary of the Forgotten Convention: The 1933 Refugee Convention and the Search for Protection between the World Wars*. Accessed March 2018.



<https://www.legalaidboard.ie/en/About-The-Board/Press-Publications/Newsletters/Anniversary-of-the-forgotten-Convention-The-1933-Refugee-Convention-and-the-search-for-protection-between-the-world-wars.html>.

Fitz-Patrick, Joan. "Revitalising the 1951 Convention." *Harvard Human Rights Journal* 9 (1996): 229-253.

Fjortoft, Trym Nohr. "Coping of Hoping Mechanisms: Evaluating the Effectiveness of National Human Rights Institutions." PhD diss., University of Oslo, 2016.

Fombad, Charles M., ed. *Compendium of Documents on National Human Rights Institutions in Eastern and Southern Africa*. Pretoria: Pretoria University Press, 2019.

Foundation for Human Rights. *Assessment of Knowledge, Services and Gaps regarding Refugee and Migrant Women and Children*, 2013.  
[https://www.fhr.org.za/files/5713/8504/0322/FHR\\_women\\_children\\_gaps\\_report\\_FINAL\\_130227.pdf](https://www.fhr.org.za/files/5713/8504/0322/FHR_women_children_gaps_report_FINAL_130227.pdf).

Foundation for Human Rights. *Refugee Report: Assessment of the Human Rights Situation of Refugees and Non-nationals July 2011 – April 2012*. Accessed 2 August, 2017.  
[http://www.fhr.org.za/files/1214/0016/1064/REFUGEES\\_AND\\_NON\\_NATIONALS\\_ASSESSMENT\\_2012\\_FINAL\\_REPORT.pdf](http://www.fhr.org.za/files/1214/0016/1064/REFUGEES_AND_NON_NATIONALS_ASSESSMENT_2012_FINAL_REPORT.pdf).

Franck, Thomas. *Fairness in International Law and Institutions*. Oxford: Clarendon Press 1995.

Freedman, Jane. "Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?" *International Migration* 48, no. 1 (2010): 175-198.  
doi:10.1111/j.1468-2435.2009.00549.x.

Gammeltoft-Hansen, Hans. "Refugee Concerns" in The Ombudsman Concept." In *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* edited by Linda Reif. The Hague: Kluwer Law International, 1999.

Gammeltoft-Hansen, Hans. "Asylum-seekers, refugees and the Danish Ombudsman." In *The Living Law of Nations* edited by G. Alfredsson and P. Macalister-Smith. Kehl: N.P. Engel, 1996.

Ganga, Deianira and Sam Scott. "Cultural" Insiders and the issue of Positionality in Qualitative Migration Research: Moving "across" and Moving "Along" Researcher-Participant Divides." *Forum Qualitative Sozialforschung/ Forum: Qualitative Social Research* 7, no.3 (2006): 1-12.

Garlick, Madeline, Elspeth Guild Caitlin, and Procter Machiel Salomons. *Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya*. Geneva: UNHCR, 2015.

Garlick, Madeline, Elspeth Guild, Machiel Salomons. *Formative Evaluation of the RSD*

*Transition process in Kenya: Summary of Selected Points Discussed at Meetings of the Steering Committee.* Geneva: UNHCR, 2015.

- Gaum, André, and Eden Esterhuizen. “Thousands of ‘Undocumented’ Children are being Deprived of the Basic Right to Education.” *SAHRC*. Accessed 18 November, 2019. <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.
- Gerber, Jan. *Parliament Asked to Speed up Public Protector Removal after ConCourt Ruling*, 22 July, 2019. <https://www.news24.com/SouthAfrica/News/parliament-asked-to-speed-up-public-protector-removal-after-concourt-ruling-20190722>.
- Gil-Bazo, María-Teresa. “Asylum as a General Principle of International Law.” *International Journal of Refugee Law* 27, Issue 1 (1 March 2015): 3–28. <https://doi.org/10.1093/ijrl/eeu062>.
- GIZ, *Better Migration Management Programme*. Accessed 16 May, 2018. <https://www.giz.de/en/worldwide/40602.html>
- Goodman, Ryan, and Derek Jinks. “How to influence States: Socialization and International Human Rights Law.” *Duke Law Journal* 54, no. 3 (December 2004): 621-703.
- Goodman, Ryan, and Thomas Pegram. “National Human Rights Institutions, State Conformity, and Social Change.” In *Human Rights, State Compliance and Social Change*, edited by Ryan Goodman, and Thomas Pegram, 1-25. Cambridge: Cambridge University Press, 2012.
- Goodwin-Gill, Guy S. “The International Law of Refugee Protection.” In *Oxford Handbook for Refugee and Forced Migration Studies*, edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, 37-52. Oxford: Oxford University Press, 2015. doi: 10.1093/oxfordhb/9780199652433.013.0021.
- Goodwin-Gill, Guy S. “Refugee Identity and Protection’s Fading Prospect.” In *Refugee Rights and Realities: Evolving International Concepts and Regimes*, edited by Frances Nicholson and Patrick Twomey, 220-249, Cambridge: Cambridge University Press, 1999.
- Goodwin-Gill, Guy S. “UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield,” *US Committee for Refugees World Refugee Survey 2000*, 26-31. Washington DC: USCRI, 2000.
- Goodwin-Gill, Guy S., and Jane McAdam, *The Refugee in International Law*, 3<sup>rd</sup> edition. Oxford: Oxford University Press, 2007.
- Gorlick, Brian. “Human Rights and Refugees: Enhancing Protection through International Human Rights Law.” *New Issues in Refugee Research Working Paper No 30* (2000): 1-52. <https://ssrn.com/abstract=2331753>.



- Gorlick, Brian. "The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees." *International Journal of Refugee Protection* 11, no. 3, 1999: 475-495.
- Gorlick, Brian, and Sumbul Rimi Khan. "Refugee Protection as Human Rights Protection: International Principles and Practice in India." *Refuge* 16, no. 6 (1997): 39-44.
- Government Printing Office. The Nuremberg Code: Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law 2, no. 10 (1949): 181-182. Washington, D.C.: U.S. Government Printing Office. Accessed 4 November 2019. <https://history.nih.gov/research/downloads/nuremberg.pdf>
- Government of Kenya. "Department of Refugee Affairs Press Release." 18 December 2012. <http://kenyalaw.org/caselaw/cases/view/84157>.
- Government of Kenya. Kenya National Action Plan for Arms Control and Management. <https://www.files.ethz.ch/isn/124869/Kenya-National-Action-Plan-2006.pdf>.
- Greenfield, Richard. "The OAU and Africa's Refugees." In *The OAU After Twenty Years*, edited by Yassin El-Ayouty and William Zartman, 209-224. New York: Praeger, 1984.
- Greim, Tamara. "Experimentalist Governance and International Refugee Law: New Ideas for Supervising the 1951 Convention." <https://ssrn.com/abstract=2949788>
- Guzman, Andrew. A Compliance-based Theory of International Law. *California Law Review* 90, no. 6 (December 2002): 1823-1887.
- Hailbronner, Kay and Jana Gogolin. "Aliens." In *Oxford Public International Law*. Oxford: Oxford University Press, 2015. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e744>.
- Hall, Samuel, and Danish Refugee Council. *Devolution in Kenya: Opportunity for Transitional Solutions for Refugees? Analysing The Impact of Devolution on Refugee Affairs In Refugee Hosting Counties*, 2015. Accessed 7 June 2018. <https://reliefweb.int/report/kenya/devolution-kenya-opportunity-transitional-solutions-refugees>
- Hamilton, Leigh. "How Home Affairs Has Been Ignoring 2 Court Orders, Putting Asylum Seekers at Risk." *News24*, 4 April, 2018. <https://www.news24.com/Columnists/GuestColumn/how-home-affairs-has-been-ignoring-2-court-orders-putting-asylum-seekers-at-risk-20180404>
- Hammerstad, Anne. "Securitization from Below: The Relationship between Immigration and Foreign Policy in South Africa's Approach to the Zimbabwe Crisis." *Conflict, Security & Development* 12, no. 1 (March 2012): 1-30. <https://doi.org/10.1080/14678802.2012.667659>.
- Handmaker, Jeff. "Efforts to Deal with Asylum Application Backlogs in South Africa."

In *Advancing Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Ann de la Hunt and Jonathan Klaaren, 117-135. New York: Berghahn Books, 2011.

Handmaker, Jeff. "Who Determines Policy? Promoting the Rights of Asylum Seekers in South Africa." *International Journal of Refugee Law* 11, no. 2 (1999): 290-309.

Hargraves, Karen, Sara Pantuliano, and Idris, Ahmed. "Closing Borders: The Ripple Effect of Australian and European and Refugee Policy: Case Studies from Indonesia, Kenya and Jordan." *HPG Working Paper* (September 2016). Accessed 9 June 2019. <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10862.pdf>.

Harrell-Bond, Barbara and Mike Kagan. "The Road Home for Africa's Refugees, Protecting the Rights of Refugees in Africa: Beginning with the UN Gatekeeper," *Pambazuka News* 182 (2004).

Harrell-Bond, Barbara. *Refugees and the International System: The Evolution of Solutions*. Accessed April 1 2018. <https://www.rsc.ox.ac.uk/files/files-1/rr-refugees-international-system-1995.pdf>.

Harvard Law School Human Rights Program. "The Role of National Human Rights Institutions in Detention Monitoring." Paper presented at the ICC22 Workshop on Detention, Geneva, Switzerland, March 23, 2009.

Harvey Colin. "Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law." *Refugee Survey Quarterly* 34, no. 1(2015): 43-60. <https://doi.org/10.1093/rsq/hdu018>.

Hathaway, James C., and Michelle Foster, *The Law of Refugee Status*, 2<sup>nd</sup> Edition, Cambridge: Cambridge University Press, 2014.

Hathaway, James C., Anthony M. North, and Jason M. Pobjoy. "Supervising the Refugee Convention: Introduction," *Journal of Refugee Studies* 26, no. 3 (2013): 323-326. <https://doi.org/10.1093/jrs/fet022>.

Hathaway, James C., Anthony M. North, and Rosemary Byrne. "The Future of Refugee Convention Supervision: Summary Conclusions." Paper presented after the Roundtable on the Future of Refugee Convention Supervision, Cambridge, United Kingdom, September 28-29, 2012.

Hathaway, James C., and Alexander Neve. "Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection." *Harvard Human Rights Journal* 10 (1997): 115-211.

Hathaway, James C. *The Rights of Refugees under International Law*. New York: Cambridge University Press, 2005.

Hoffmann, Matthew J. *Ozone Depletion and Climate Change: Constructing a Global Response*. Albany: State University of New York Press 2005.

- Hoffman, Rainer. "Refugee Law in the African Context." *Heidelberg Journal of International Law* 52 (1992): 318-333.  
[http://www.zaoerv.de/52\\_1992/52\\_1992\\_2\\_a\\_318\\_333.pdf](http://www.zaoerv.de/52_1992/52_1992_2_a_318_333.pdf)
- Hossain, Mazedra Chimaraoke Izugbara, Alys McAlpine, Stella Muthuri, Loraine Bacchus, Sheru Muuo, Anjalee Kohli, Carolyne Egesa, Rachel Pearson, Giorgia Franchi, and Mairi MacRae. *Violence, uncertainty, and resilience among refugee women and community workers: An evaluation of gender-based violence case management services in the Dadaab refugee camps*. London: Department for International Development (DFID), 2018.  
<https://www.whatworks.co.za/documents/publications/177-what-works-dadaab-report-lowres/file>
- Hough, Carrie. "Newcomers to Nairobi: The Protection Concerns and Survival Strategies of Asylum Seekers in Kenya's Capital City." *New Issues in Refugee Research*, no. 260 (2013).
- Human Rights First. "The Road to Safety: Strengthening Protection for LGBTI Refugees in Uganda and Kenya, 2012." [https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The\\_Road\\_to\\_Safety.pdf](https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The_Road_to_Safety.pdf).
- Human Rights Watch. *World Report 2018: Events of 2017*. New York: Human Rights Watch, 2017.
- Human Rights Watch. "Kenya: Counterterrorism Operations Undermine Rights, No Justice for Security Force Abuses." Accessed June 10, 2018.  
<https://www.hrw.org/news/2015/01/29/kenya-counterterrorism-operations-undermine-rights>.
- Human Rights Watch. *You Are All Terrorists: Kenyan Police Abuse of Refugees in Nairobi*. New York: Human Rights Watch, 2012.
- Human Rights Watch. "Kenya: Police Abuse Somali Refugees Government, UN, Donors Should Address Widespread Violence, Degrading Detention, Extortion, and Policing Failures." June 17 2010. <https://www.hrw.org/news/2010/06/17/kenya-police-abuse-somali-refugees>
- Human Rights Watch. "Human Rights Watch, World Report, 2007- South Africa." January 2007. <http://www.refworld.org/docid/45aca2a51a.html>
- Human Rights Watch. "Living on the Margins: Inadequate Protection of Refugees and Asylum Seekers in Johannesburg." November 16, 2005.  
<https://www.hrw.org/report/2005/11/16/living-margins/inadequate-protection-refugees-and-asylum-seekers-johannesburg>
- Human Rights Watch. *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya*. New York: Human Rights Watch, 2002.

- Human Rights Watch. *Protectors or Pretenders? Government Human Rights Commissions in Africa*. New York: Human Rights Watch, 2001.  
<https://www.hrw.org/reports/2001/africa/overview/record.html>
- Human Rights Watch. *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-seekers, and Refugees in South Africa*. New York: Human Rights Watch, 1998.
- Human Rights Watch. *Seeking Refugee, Finding Terror: The Widespread Rape of Somali Women Refugees in North-Eastern Kenya*. New York: Human Rights Watch: 1993.
- HSRC. *Assessment of the Relationship between CSOs and NHRIs in South Africa*. Pretoria: HSRC, 2007.
- Huysmans, Jef. "The European Union and the Securitization of Migration." *Journal of Common Market Studies* 38, no. 5 (December 2000): 751-778.
- Hyman, David A., and William E. Kovacic. "Why Who Does What Matters: Governmental Design and Agency Performance." *George Washington Law Review* 82, no. 5 (October 2014): 1446-1516.
- Ibrahim, Maggie. "The Securitization of Migration: A Racial Discourse." *International Migration*, 3, no. 5 (November 2005): 163-187 <https://doi-org.ezproxy.uct.ac.za/10.1111/j.1468-2435.2005.00345.x>.
- Icelandic Human Rights Centre. "Implementation." *Icelandic Human Rights Centre: Human Rights Project*. Accessed 12 August 2020. <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/implementation>.
- Idike, Chinedu. "Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus." *Essex Human Rights Review* 1, no.1 (2004): 40-53.  
<http://projects.essex.ac.uk/ehrr/V1N1/Idike.pdf>
- Ilgit, Asli and Audie Klotz. "How Far Does 'Societal Security' Travel? Securitization in South African immigration policies." *Security Dialogue* 45, no. 2 (April 2014): 137-155.
- Independent Police Oversight Authority. "IPOA Board undergoes human rights training." *IPOA*. Accessed 25 August 2019. <https://www.ipoa.go.ke/ipoa-board-undergoes-human-rights-training/>.
- Ineli-Ciger, Meltem. "Protection Gaps and Temporary Protection." *Max Planck Yearbook of United Nations Law* 20, (2016): 408-435.
- International Council on Human Rights Policy. *Assessing the Effectiveness of National Human Rights Institutions*. Geneva: ICHRP, 2005.
- International Council on Human Rights Policy. *Performance and Legitimacy: National Human Rights Institutions 2<sup>nd</sup> edition*. Versoix: ICHRP, 2004.

- International Federation for Human Rights (FIDH). "Surplus People? Undocumented and Other Vulnerable Migrants in South Africa." 2008.
- International Rescue Committee. *Kenya: Citizen's Perceptions on Refugees*. Nairobi: IRC, 2018.
- ISHR. *Bridging the Gap: NHRIs in the Human Rights Council*. Geneva: ISHR, 2015.
- Iyar, Serisha. *The Most Vulnerable: An Intersectional Approach to Refugee Policymaking and Advocacy Efforts*. Ottawa: Citizens for Public Justice, 2019. <https://cpj.ca/wp-content/uploads/The-Most-Vulnerable-Report-by-Serisha-Iyar.pdf>.
- Jacobsen, Karen and Loren B. Landau. "The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration." *Disasters* 27, no. 3 (2003): 185–206.
- Jadoo, Yadhana. "SAHRC: the Attacks are Xenophobic." *The Citizen*, 15 April, 2015. <https://citizen.co.za/news/south-africa/363239/xeno-sahrc/>.
- Jaeger, Gilbert. "On the History of the International Protection of Refugees." *International Review of the Red Cross* 83, 843 (2001): 727-736.
- Janmyr, Maja. "No Country of Asylum: "Legitimizing" Lebanon's Rejection of the 1951 Refugee Convention." *International Journal of Refugee Law* 29, no.3 (2017): 438-465 doi:10.1093/ijrl/eex026.
- Jensen, Steven L. *Lessons From Research on National Human Rights Institutions: A Desk Review on Findings Related to NHRIs*. Copenhagen: DIHR, 2018. [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/research/workingpaper\\_lessons\\_research\\_nhris\\_web\\_2018.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/research/workingpaper_lessons_research_nhris_web_2018.pdf).
- Jessup, Francesca, and Koffi Kounte. *Evaluation of OHCHR Support to National Human Rights Institution*. Geneva: OHCHR, 2015.
- Jhabvala, Farrokh. "On Human Rights and the Socio-Economic Context." *Netherlands International Law Review* 31(1984): 149-182.
- Johnston, Alastair Iain. "Treating International Institutions as Social Environments." *International Studies Quarterly* 45, no. 4 (December, 2001): 487-515.
- Jones, Martin. "Moving Beyond Protection Space: Developing A Law of Asylum in South-East Asia." In *Refugee Protection and the Role of Law: Conflicting Identities*, edited by Susan Kneebone, Dallal Stevens, and Loretta Baldassar, 251-270. New York: Routledge, 2014.
- Kaajal Ramjathan-Keogh, *Presentation at Refugee Status Determination and Rights in Southern and East Africa Regional Workshop Kampala, November 2010 Country Report: Refugee Status Determination in South Africa*. Johannesburg: Lawyers for Human Rights, 2010.

- Kämpf, Andrea. *National Human Rights Institutions and their Work on Migrants' Human Rights: Results of a Survey among NHRIs*. Berlin: German Institute for Human Rights, 2018. [https://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/ANALYSE/Analysis\\_NHRI\\_and\\_their\\_work\\_on\\_migrants\\_human\\_rights.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analysis_NHRI_and_their_work_on_migrants_human_rights.pdf)
- Kapron, Mary and Nicole LaViolette. *Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography*. Ottawa: University of Ottawa, 2014. <https://www.oramrefugee.org/wp-content/uploads/2016/05/SOGI-Refugees-Annotated-Bibliography.pdf>. Accessed 5 June 2020.
- Karanja, Rufus. "The Blurred Line: Preserving the Asylum Space in the Context of Increasing Insecurity." *Refugee Insights*, no. 25, (2014).
- Keet, Andre. "The Challenges for NHRIs and Human Rights Education." In *The Role of National Human Rights Institutions in advancing Human Rights Education*. Copenhagen: DIHR, 2014.
- Kelley, Kevin J. "Dadaab Camps Closure on Target, says UN." *Daily Nation*, 2 March 2017. <https://www.nation.co.ke/news/Daadab-camps-closure-on-target-says-UN/1056-3834216-10nkrffz/index.html>.
- Kennedy, David. "International Refugee Protection." *Human Rights Quarterly* 8 (1986): 1-69.
- Khan, Azfer Ali. "Can International Law Manage Refugee Crises?" *Oxford University Undergraduate Law Journal* (2016): 54-66.
- Khayundi, Francis B. M. *The Kenya National Commission on Human Rights and the Promotion, Protection and Monitoring of Socio-Economic Rights in Kenya*. PhD diss., Rhodes University, 2017.
- Kiama, Lucy, and Rufus Karanja. "Asylum space in Kenya: evolution of refugee protection over 20 years." *Forced Migration Review-25<sup>th</sup> Anniversary Collection*, (November 2012) <https://www.fmreview.org/25th-anniversary/kiama-karanja>
- Kim, Dongwook. "International Nongovernmental Organizations and the Global Diffusion of National Human Rights Institutions." *International Organization*, 67, Issue 3(July 2013): 505-539. <https://doi.org/10.1017/S0020818313000131>.
- Kindiki, Kithure. "On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment." *East African Journal of Human Rights and Democracy* 2 (2004).
- Klaaren, Jonathan, Jeff Handmaker and Lee Anne de la Hunt. "Talking a New Talk: A Legislative History of the Refugees Act 130 of 1998." In *Advancing Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Ann de la Hunt and Jonathan Klaaren, 47-60. New York: Berghahn Books, 2011.
- Kleinsmidt, Verne and Desiree Manicom. "A Policy Analysis of the Refugee Act 130 of



- 1998,” *Africa Insight* 39, no. 4 (2010): 164-183.
- Konzolo, Simon. *An Overview of Refugee Status Determination and the Rights of Refugees in Kenya: The Protection Envisaged under the 2006 Refugees Act, Paper Prepared for Refugee Studies Centre Workshop on Refugee Status Determination and Rights in Southern and East Africa*. Refugee Consortium of Kenya.
- Koser, Khalid. *Reforming the International Protection Regime: Responsibilities, Roles and Policy Options for Australia*. Sydney: Lowy Institute, 2016. Accessed May 3, 2017. <https://www.lowyinstitute.org/publications/reforming-international-protection-regime-responsibilities-roles-and-policy-options>.
- Koshy, Shaila. “Suhakam Urges Malaysia to Recognise Rights of Refugees.” *Nation*, 27 November, 2015. <https://www.thestar.com.my/news/nation/2015/11/27/suhakam-urges-malaysia-to-recognise-rights-of-refugees>
- Kronenberger, M. Jane. “Refugee Women: Establishing a Prima Facie Case under the Refugee Convention.” *ILSA Journal of International Law* 15 (1992): 61-84.
- Kumar, C Raj. “National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights.” *American University International Law Journal* 19 (2003): 259-260.
- KHRC. *Let's We Forget: The faces of Impunity in Kenya*. Nairobi: KHRC, 2011. <https://www.khrc.or.ke/publications/30-lest-we-forget-the-faces-of-impunity-in-kenya/file.html>.
- Lacatus, Corina. “The Design of National Human Rights Institutions: Global Patterns of Institutional Diffusion and Strength.” PhD thesis, The London School of Economics and Political Science, 2016.
- Landau, Loren. “Tragedy or Farce? Xenophobic Violence against Foreign Nationals and Other “Outsiders” in Post- Apartheid South Africa.” *African Centre for Migration Studies Issue Brief*, 17 (March 2016).
- Landau, Loren. “Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy.” *Journal of Refugee Studies* 19, no. 3 (September 2006): 308–327 <https://doi.org/10.1093/jrs/fel012>.
- Lanz, David. “Subversion or Reinvention - Dilemmas and Debates in the Context of UNHCR's Increasing Involvement with IDPs.” *Journal of Refugee Studies* 21, no. 2 (April 2008): 192-209.
- Lauterpacht, Elihu, and Daniel Bethlehem. “The Scope and Content of the Principle of *Non-refoulement*: Opinion.” In *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by Erika Feller, Volker Türk and Frances Nicholson, 89-177. Cambridge: Cambridge University Press, 2003.

- LaViolette, Nicole. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": A Critical Commentary," *International Journal of Refugee Law* 22.2 (2010): 173-208. <https://doi.org/10.1093/ijrl/eeq019>.
- Lawyers for Human Rights. "Home Affairs Reopens Refugee Office in Port Elizabeth after Years of Litigation." *LHR*. Accessed 5 February 2020. <http://www.lhr.org.za/news/2018/home-affairs-reopens-refugee-office-port-elizabeth-after-years-litigation>.
- Lawyers for Human Rights. *Monitoring Immigration Detention in South Africa*. Pretoria: LHR, 2012.
- Lawyers for Human Rights. "Migrants Suffer as South Africa's Refugee System Crumbles." *LHR*. Accessed 10 June, 2019 <https://www.lhr.org.za/news/2012/migrants-suffer-south-africa's-refugee-system-crumbles>
- Lawyers for Human Rights. "LHR dismayed at closure of refugee reception office in Johannesburg." *LHR*. Accessed 3 September 2019. <https://www.lhr.org.za/news/2011/lhr-dismayed-closure-refugee-reception-office-johannesburg>
- Lavrakas, Paul J., ed. *Encyclopedia of Survey Research Methods*. Los Angeles: SAGE, 2008. <http://dx.doi.org/10.4135/9781412963947.n629>
- Lee, Edward Ou Jin and Shari Brotman. "Identity, Refugeeeness, Belonging: Experiences of Sexual Minority Refugees in Canada." *Canadian Review of Sociology* 48, Issue 3 (August 2011): 241-274.
- Lentini, Elizabeth J. "The Definition of Refugee in International Law: Proposals for the Future." *Boston College Third World Law Journal* (1985): 183-198. Accessed June 22, 2017. <http://lawdigitalcommons.bc.edu/twlj/vol5/iss2/5>.
- Lewis, Corinne. *UNHCR and International Refugee Law: From Treaties to Innovation*. London: Routledge, 2012.
- Liamputtong, Pranee ed., *Research Methods in Health: Foundations for Evidence-based Practice* 2nd Edition. Oxford: Oxford University Press, 2013.
- Lindley, Anna. "Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya." *Refugee Survey Quarterly*, (2011): 1-36. DOI:10.1093/rsq/hdr013
- Linos, Katerina and Tom Pegram. "What works in human rights institutions?" *American Journal of International Law* 111, 3 (July 2017): 628-688. <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/what-works-in-human-rights-institutions/C24517FEA634993D5AB4488B19E42746/core-reader#>.



- Linós, Katerina and Tom Pegram, "Architects of Their Own Making: National Human Rights Institutions and the United Nations," *Human Rights Quarterly* 38, no. 4 (November 2016): 1109-1134.
- Linós, Katarina and Thomas Pegram. *Interrogating Form and Function: Designing Effective National Human Rights Institutions*. Copenhagen: Danish Institute for Human Rights, 2015.
- Loescher, Gil. 'UNHCR at Fifty: Refugee Protection and World Politics' in *Problems of Protection: The UNHCR, Refugees and Human Rights*, edited by Niklaus Steiner, Mark Gibney, and Gil Loescher, 12-18. New York: Routledge, 2012.
- Magqibelo, Lungile, Marcel Londt, Shiron September and Nicolette Roman. "Challenges Faced by Unaccompanied Minor-Refugees in South Africa." *Social Work* (Stellenbosch. Online) 52, no. 1, Issue 5 (2016): 70-89.  
<https://dx.doi.org/10.15270/52-1-480>;
- Maina, Andrew. "Development of Refugee Law in Kenya." *World Policy Journal* (2016). <https://worldpolicy.org/2016/03/29/development-of-refugee-law-in-kenya/>
- Maina, Andrew. "Securitization of Kenya's Asylum Space: Origin and Legal Analysis of the Encampment Policy." In *Refugees and Forced Migration in the Horn and Eastern Africa: Trends, Challenges and Opportunities*, edited by Johannes Dragsbaek Schmidt, Leah Kimathi, Michael Omondi Owiso, 81-90. Switzerland: Springer, 2019.
- Maina, Joseph. "Do Articles 2(5) and 2(6) of the Constitution of Kenya 2010 Transform Kenya into a Monist State?" *SSRN*, (30 September, 2013).  
<http://dx.doi.org/10.2139/ssrn.2516706>.
- Maina, Wamuyu. "Kenya's Refugee Policy Cries Out For Rethink." *The Daily Nation*, 21 March 2018.
- Majola Bongani. "Refugees Have an Equal Right to Healthcare," *Mail & Guardian*, 23 June 2017. <https://mg.co.za/article/2017-06-23-00-refugees-have-an-equal-right-to-healthcare>.
- Manicom, Desiree and Fairuz Mullagee. "The Status of Asylum Seekers and Refugees in South Africa: An Independent Overview." *Africa Insight* 39, no. 4 (March 2010): 184-197.
- Manjoo, Rashida. Case Study: The Commission for Gender Equality, South Africa." *Griffith Law Review* 14, no. 2 (2005): 268-279 <https://doi-org.ezproxy.uct.ac.za/10.1080/10383441.2005.10854560>.
- Margulies, Peter. "Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group." *Georgetown Immigration Law Journal* Vol. 8 (Fall 1994): 521-555.
- May, Tim. *Social Research: Issues, Methods and Process*. Buckingham: Open University Press, 1993.
- Mbae, Peace Loise. "KNCHR Report: 25 Killed, 81 Missing in Anti-terror Operation."

- Standard Digital*, 15 September, 2015.  
<https://www.standardmedia.co.ke/article/2000176419/knchr-report-25-killed-81-missing-in-anti-terror-operation>.
- McAdam, Jane. "The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection." *New Issues in Refugee Research*, no. 125 (2006): 1-16.
- McAll-Smith, Kasey L. "Book Review: Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*. (Cambridge University Press, Cambridge, 2012) xii + 351pp." *Human Rights Law Review* 13 (2013): 603-619. doi:10.1093/hrlr/ngtO22.
- McCall, Leslie. "The Complexity of Intersectionality." *Signs Journal of Women in Society and Culture* 30, no. 3 (2005): 1771-1800.
- McConville, Mike and Hong Wing Chui, eds. *Research Methods for Law*. Edinburgh: Edinburgh University Press, 2007.
- Meier, Benjamin Mason Marlou De Milliano, Averi Chakrabarti and Yuna Kim. "Accountability for the Human Right to Health through Treaty Monitoring: Human Rights Treaty Bodies and the Influence of Concluding Observations. *Global Public Health* 13, no. 11 (2018): 1558-1576. DOI: 10.1080/17441692.2017.1394480.
- Meintjes, Sheila. "Gender Equality by Design: The Case of South Africa's Commission on Gender Equality." *South African Journal of Political Studies* 32, no. 2 (2005): 259-275 <https://doi-org.ezproxy.uct.ac.za/10.1080/02589340500353631>.
- Meritus, Julie. "Evaluating NHRIs: Considering Structure, Mandate and Impact." In *Human Rights, State Conformity and Social Change: Assessing National Human Rights Institutions* Ryan Goodman and Thomas Pegram, 74-90. Cambridge: Cambridge University Press, 2012.
- Meuwissen, K. "NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?" *Working Paper No. 154* (2015): 1-40.  
[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp151-160/wp154-meuwissen.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp154-meuwissen.pdf).
- Meyer, David S. "National Human Rights Institutions, Opportunities, and Activism." In *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, edited by Ryan Goodman and Thomas Pegram, 324-334. Cambridge: Cambridge University Press, 2012.
- Middleton, June. "Barriers to Protection: Gender-Related Persecution and Asylum in South Africa." Master's Thesis, University of the Witwatersrand, 2009.
- Millo, Yiftach. "Identity and Integration in Israel and Kenya." *Sexual Orientation and Gender Identity and the Protection of Forced Migrants, Forced Migration Review*, no. 42 (April 2013): 52-53.
- Misago, Jean Pierre, Iriann Freemantle and Loren B. Landau. *Protection from Xenophobia:*

*An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes.* Pretoria: UNHCR, 2016.

- Mohammed, Hussein. "Closing Dadaab Camp Not A Solution To Terrorism." *Standard Digital*, 7 May 2018 <https://www.standardmedia.co.ke/article/2001279541/closing-dadaab-not-a-solution-to-terrorism>.
- Moodley, Yellavarne. "Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights." *Working Paper Series* 5 (2012). [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Paper\\_5\\_of\\_2012.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_5_of_2012.pdf)
- Mortem, Kjærum. "Human Rights Organisations and the Formation of Refugee Regimes." In *Global Challenges in Asylum Regimes*, edited by Daniele Joly, 204-214. New York: Palgrave Macmillan, 2002.
- Mortem, Kjærum. *National Human Rights Institutions Implementing Human Rights*. The Hague: Martinus Nijhoff Publishers, 2003.
- Mullaly, Siobahn "Gender Asylum Law: Providing Transformative Remedies?" In *Contemporary Issues in Refugee Law* edited by Satvinder Singh Juss and Colin Harvey, Gloucestershire: Edward Elgar Publishing Ltd: 2013: 196-224. <https://doi-org.ezproxy.uct.ac.za/10.4337/9781782547662>
- Mureu, Lynester. "Entrenching Human Rights Education in Institutions of Higher Learning." *KNCHR*, 25 February, 2019. <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1065/Entrenching-Human-Rights-Education-in-Learning-Institutions> .
- Muriuki, Oscar. "Xenophobia and the Challenges of Managing Asylum System in a "Securitised" Environment." *Refugee Insights*, 25(2014): 4-6.
- Murray, Rachel. "National Human Rights Institutions: Criteria and Factors for Assessing their Effectiveness." *Netherlands Quarterly of Human Rights* 25, no. 2 (June 2007): 189-220.
- Murray, Rachel. *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*. Oxford: Hart Publishing, 2007.
- Musuva, Catherine. *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa's Public Protector and Human Rights Commission, Research Report*. Johannesburg: EISA, 2009.
- Mwangi, Oscar Gakuo. "Statelessness, Ungoverned Spaces and Security in Kenya." In *Understanding Statelessness*, edited by Tendayi Bloom, Katherine Tonkiss and Phillip Cole, chapter 8. London: Routledge, 2018.
- Mwangi, Veronica Wambui. "Strategic Responses by Kenya National Commission on Human Rights (KNCHR) to changes in the External Environment." Masters' thesis, University of Nairobi, 2014.

- Naldi, Gino J. and Cristiano D'Orsi. "The Role of the African Human Rights System with Reference to Asylum Seekers." In *Regional Approaches to the Protection of Asylum Seekers: An International Perspective* edited by Ademola Abass and Francesca Ippolito, 45-65. Burlington: Ashgate, 2014.
- Nanima, Robert Doya. "An Evaluation of Kenya's Parallel Legal Regime on Refugees and the Courts Guarantee of their Rights." *Law, Democracy and Development*, 21 (2017). <https://dx.doi.org/10.4314/ldd.v21i1.3>.
- Nash, Jennifer C. "Rethinking Intersectionality." *Feminist Review* Vol. 89, No.1 (2008): 1-15. <https://doi.org/10.1057/fr.2008.4>.
- National Assembly. "Responses by the Minister of Home Affairs to the Portfolio Committee for Home Affairs." *PMG*, 9 March 2017. <https://pmg.org.za/committee-question/4690/>.
- National Assembly. "State of Refugee Reception Offices: Briefing by Deputy Minister to the Portfolio Committee on Home Affairs." *PMG*, 28 June 2011.
- National Assembly. *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions (Kader Asmal Report)*, 31 July 2007. <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf>
- National Assembly Portfolio Committee of Justice and Correctional Services. "Duplication in Functions of Institutions Supporting Democracy: Input by the Commission for Gender Equality; South African Human Rights Commission; Public Protector; Public Service Commission." *PMG*, 19 August 2014. <https://pmg.org.za/committee-meeting/17381/>
- National Assembly Portfolio Committee on Justice and Correctional Services. "Prevention and Combating of Hate Crimes and Hate Speech Bill and International Crimes Bill: Briefing with Minister and Deputy Minister." *PMG*. Accessed July 2, 2018. <https://pmg.org.za/page/Prevention%20and%20Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%20Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister>
- Newham, Gareth. "It Is High Time South Africans Begin to Tackle the Problem of Xenophobia for What It Is – If Only for the Sake of Self-interest," Interview by Peter Fabricius, *ISS Today*, 2 March 2017. <https://www.dailymaverick.co.za/article/2017-03-02-iss-today-xenophobia-once-again-jeopardises-south-africas-interests-in-africa/#.WzouhS2B18c>
- Nicholson, Frances and Judith Kumin. *A Guide to International Refugee Protection and Building State Asylum Systems: A Handbook for Parliamentarians*. Geneva: UNHCR and IPU, 2017.
- Niyitunga, Eric Blanco. "Impact of 'Global War on Terror' on the Rights of Refugees and

- Asylum Seekers in the Horn of Africa - An Analysis of the Somali Refugees and Asylum Seekers in Kenya.” *Africa Insights* 45, no. 3 (2015): 46-62.  
<https://journals.co.za/content/afrins/45/3>.
- Noor, Hawa. “Repatriation of Somali Refugees from Kenya and the Principle of *Non-Refoulement*.” *Pambazuka News*, February 5, 2014.  
<https://www.pambazuka.org/human-security/repatriation-somali-refugees-kenya-and-principle-non-refoulement>
- Nordström, Peter. “Gender and Reconciliation in the New Kenya: Equality at the Heart,” *Policy Brief, Promoting Cohesion and Reconciliation in Kenya* no. 3 (July 2013):1-16.
- NRC and IHRC. *Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status* (November 2017).  
[http://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees\\_nrc\\_ihrc\\_november2017\\_embargoed.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees_nrc_ihrc_november2017_embargoed.pdf).
- Nyarangi, Edwin. “Kenya National Commission on Human Rights and Kisii University Sign Training Deal.” *Standard Digital*, 23 February, 2019.  
<https://www.standardmedia.co.ke/article/2001314065/kenya-national-commission-on-human-rights-and-kisii-university-sign-training-deal>.
- Obeng Mireku. “South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties.” *Law and Politics in Africa, Asia and Latin America* 35, no.3 (2002): 399-413.
- O’Byrne, Katie. “Is there a *Need* for Better Supervision of the Refugee Convention?” *Journal of Refugee Studies*, 26 (2013): 330-359.
- O’Callaghan, Sorchia, and Georgina Sturge. “Against all Odds: Refugee Integration in Kenya.” *Humanitarian Policy Group Working Paper* (December 2018).  
<https://www.odi.org/sites/odi.org.uk/files/resource-documents/12542.pdf>
- Odunkalu, Chidi. “From Architecture to Geometry: The Relationship Between the African Commission on Human and People’s Rights and Organs of the African Union.” *Human Rights Quarterly* 35, no. 4 (2013): 850-869. [10.1353/hrq.2013.0056](https://doi.org/10.1353/hrq.2013.0056).
- Office of the Attorney General and Department of Justice. *Sessional Paper No.3 of 2014, National Action Plan on Human Rights*. 24 April 2014.
- OHCHR, Asia Pacific Forum, and Association for the Prevention of Torture. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. Geneva: OHCHR, 2010.
- Okpechi, Abiola. “Access to Justice by Refugees and Asylum Seekers in South Africa.” PhD thesis, University of Cape Town, 2011.

- Orago, Nicholas Wasonga. "The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective." *African Human Rights Journal* 2, no. 18(2013): 415-440.
- Owino, Samwel. "Uhuru Refers Refugees Bill back to the House." *Daily Nation*, 9 November 2017.
- Onyekwena, Chukwuka, and Mma Amara Ekerucheb. "Building Political Will for Policy Change: The Role of CSOs in Nigeria." 27 May 2019. <https://onthinktanks.org/articles/building-political-will-for-policy-change-the-role-of-csos-in-nigeria/>
- OSCE. *Outcome report: Expert meeting on strengthening the independence of NHRIs in the OSCE region ODIHR premises*, Warsaw, Poland 28-29 November 2016. Accessed 2 December, 2019. <https://www.osce.org/odihr/310331?download=true>.
- Palmary, Ingrid. *For Better Implementation of Migrant Children's Rights in South Africa*. UNICEF: Pretoria, 2009.
- Palys, Ted. "Purposive Sampling." In *The Sage Encyclopedia of Qualitative Research Methods*, (Vol.2), edited by L. M. Given, 697-698. Los Angeles: Sage, 2008.
- Parliamentary Monitoring Group (PMG). "Questions to the Minister of Home Affairs." *PMG*, March 9, 2017. <https://pmg.org.za/committee-question/4690/>.
- Parliamentary Monitoring Group. "SA Human Rights Commission Report on 2008 Violence against Non-nationals: Briefing, Parliamentary Committee on Social Development." *PMG*, 23 November 2010. <https://pmg.org.za/committee-meeting/12409/>.
- Parliamentary Monitoring Group. "South African Human Rights Commission on Challenges around Submission of National Human Rights Reports to International Organisations and Possible Role of Parliament in this." *PMG*, 14 September, 2010. <https://pmg.org.za/committee-meeting/12053/>.
- Parliamentary Monitoring Group. *Draft Report By The South African Human Rights Commission on the Open Hearings on Xenophobia and Problems Related to It: Hosted by the SAHRC and the Parliamentary Portfolio Committee* (29 July 2005).
- Parliamentary Monitoring Group. "Rights Commission on the Impact of Xenophobia on Refugees and Asylum Seekers." *PMG*, 28 October 2004. <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/041102unhcr.htm>.
- Parsley, Jennifer. "'We Are Not Treated Like People': The Roll Back Xenophobia Campaign in South Africa." 2003. <https://odihpn.org/magazine/we-are-not-treated-like-people-the-roll-back-xenophobia-campaign-in-south-africa/>.
- Pavanello, Sara Samir Elhawary and Sara Pantuliano. "Hidden and Exposed: Urban Refugees in Nairobi, Kenya." *HPG Working Paper* (2010). <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>.



- Pedersen, Joakim Ander Rimmer Lomelin Osuna. "Human Rights of Refugees in Uganda: the CRRF Norm Translated In ReHOPE," Master Thesis, Aalborg University, 2018. [https://projekter.aau.dk/projekter/en/studentthesis/human-rights-of-refugees-in-uganda-the-crrf-norm-translated-into-rehope\(47db4c80-8fe4-4c79-9b72-442ad2af2cbd\).html](https://projekter.aau.dk/projekter/en/studentthesis/human-rights-of-refugees-in-uganda-the-crrf-norm-translated-into-rehope(47db4c80-8fe4-4c79-9b72-442ad2af2cbd).html).
- Pegram, Thomas. "National Human Rights Institutions in Latin America: Politics and Institutionalization." In *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, edited by Ryan Goodman and Thomas Pegram, 210-240. New York: Cambridge University Press, 2012.
- Pegram, Thomas. "Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions." *Human Rights Quarterly* 32, no.3 (August 2010): 729-760. doi: 10.1353/hrq/2010.0005.
- Persaud, Santhosh. "Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights." *UNHCR: New Issues in Refugee Research: Research Paper no. 132* (Nov. 2006)
- Pieper, I and C.J.H Thomson, "Justice in Human Research Ethics: A Conceptual and Practical Guide," *Monash Bioethics Review* I, 31, no. 1, (2013): 99-116.
- Pohjolainen, Anna-Elina. *The Evolution of National Human Rights Institutions: The Role of the United Nations*. Copenhagen: Danish Institute for Human Rights, 2006.
- Polzer, Tara and Laura Hammond. "Invisible Displacement." *Journal of Refugee Studies* 21, no. 4 (2008): 417-431. <https://doi.org/10.1093/jrs/fen045>.
- Post, Lori Ann, Amber N.W. Raile, and Eric D. Raile. "Defining Political Will," *Politics & Policy* 38, no. 4 (2010): 653-676. <https://onlinelibrary-wiley-com.ezproxy.uct.ac.za/doi/epdf/10.1111/j.1747-1346.2010.00253.x>
- Postman, Zoe. "Home Affairs asks UN for Help with Refugee backlog." *News24*, 17, May 2019. <https://m.news24.com/SouthAfrica/News/home-affairs-asks-un-for-help-with-refugee-backlog-20190516>.
- Price, James H. and Judy Murnan. "Research Limitations and the Necessity of Reporting Them." *American Journal of Health Education*, 35 (2004): 66-67. <https://doi.org/10.1080/19325037.2004.10603611>
- Pugh, Sarah A. "Advocacy in the Time of Xenophobia: Civil Society, the State, and the Politics of Migration in South Africa." *Politikon* 41, no. 2 (2014): 227-247. doi:10.1080/02589346.2014.905255 231.
- Qin, Dongxiao. "Positionality," *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, (April, 2016). DOI: 10.1002/9781118663219
- Quintal, Genevieve. "Start of process to remove public protector gets the thumbs up:

- National Assembly Speaker Thandi Modise approves request for proceedings against Busisiwe Mkhwebane,” *BusinessDay*. Accessed 26 January 2020. <https://www.businesslive.co.za/bd/national/2020-01-24-start-of-process-to-remove-public-protector-gets-the-thumbs-up/>,
- Ralph, Jason and James Souter. “Introduction: The Responsibility to Protect and the Refugee Protection Regime.” *Ethics and International Affairs* 31, no.1 (2017). Accessed April 27, 2017. <https://www.ethicsandinternationalaffairs.org/2017/introduction-rtop-refugee-protection-regime/>.
- Raustiala, Kal, and Anne-Marie Slaughter. “International law, International Relations and Compliance.” In *Handbook of International Relations*, edited by Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, 547-548. London: SAGE Publications Ltd, 2002.
- Regional Durable Solutions Secretariat (ReDSS) / Samuel Hall. “Devolution in Kenya: Opportunity for Transitional Solutions for Refugees? Analysing The Impact of Devolution on Refugee Affairs In Refugee Hosting Counties.” 2015.
- Refugee Law Initiative. “Comparative Regional Approaches to Refugee Protection.” Accessed 4 May 2018. <https://rli.sas.ac.uk/research-projects/pushing-boundaries/comparative-regional-approaches-refugee-protection>.
- Refugee Consortium of Kenya. “Milestones in Refugee Management.” 2015.
- Reich, Simon. “Four Faces of Institutionalism: Public Policy and a Pluralistic Perspective.” *Governance* 13, Issue 4 (Oct 2000): 501-534.
- Reif, Linda C. “Book Review: Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014). In *Human Rights Law Review* 15, no.1 (2015): 185-190. <https://doi.org/10.1093/hrlr/ngu039>.
- Reif, Linda C. “The Shifting Boundaries of NHRI Definition in the International System.” In *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, edited by Ryan Goodman and Thomas Pegram, 52-73. Cambridge: Cambridge University Press, 2012.
- Reif, Linda C. “Building Democratic Institutions: The Role of National Human Rights Institutions In Good Governance.” *Harvard Human Rights Journal* 13, no.1 (2000): 8-9.
- Renshaw, Catherine, and Kieren Fitzpatrick. “National Human Rights Institutions in the Asia Pacific Region: Change Agents under Conditions of Uncertainty.” In *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, edited by Ryan Goodman and Tom Pegram, 150-180. New York: Cambridge University Press, 2012.
- Renshaw, Catherine Shanahan. “National Human Rights Institutions and Civil Society Organisations: New Dynamics of Engagement at Domestic, Regional and International Levels.” *Global Governance* 18, no. 3 (July-Sept. 2012): 299-316.



- Renshaw, Catherine Andrew Byrnes, and Andrea Durbach. "Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia." *Asian Journal of International Law* 1, no.1 (2011): 165-198.
- Reus-Smit, C. "Constructivism in Theories of International Relations." In *Theories of International Relations* Third Edition, edited by Scott Burchill, and Andrew Linklater. 188-212. New York: Palgrave, 2005.
- Robinson, Rebecca S. "Purposive Sampling." In *Encyclopedia of Quality Life and Well-Being Research*, edited by Alex C. Michalos. Dordrecht: Springer, 2014. [https://doi.org/10.1007/978-94-007-0753-5\\_2337](https://doi.org/10.1007/978-94-007-0753-5_2337).
- Roberts, David. "What is 'Political Will,' Anyway? Scholars Take a Whack at Defining It." *Vox*. <https://www.vox.com/2016/2/17/11030876/political-will-definition>.
- Rowe, Wendy E. "Positionality" in *The SAGE Encyclopedia of Action Research* edited by David Coghlan and Mary Brydon-Miller, 628-631. London: Sage Publications Ltd., 2014. DOI: <https://dx.doi.org/10.4135/9781446294406>
- Rutinwa, Bonaventure. "The End of Asylum? The Changing Nature of Refugee Policies in Africa." *Refugee Survey Quarterly* 2, no.1-2 (2002): 12-41.
- Scalabrini Centre. *Foreign Children in Care: South Africa: A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa*. Cape Town: Scalabrini Centre, July 2019.
- Schneider, Anne and Helen Ingram. "Social Construction of Target Populations: Implications for Politics and Policy." *The American Political Science Review* 87, no. 2 (June 1993): 334-347.
- Schreier, Tal. *Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the UCT Refugee Rights Unit*, Cape Town: UCT Refugee Rights Unit, 2011.
- Sen, Sreya. "Understanding India's Refusal to Accede to the 1951 Convention: Context and Critique." In *Refugee Review: Re-conceptualising Refugees and Forced Migration in the 21<sup>st</sup> Century*, May 28, 2015. [https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/#\\_ftn12](https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/#_ftn12).
- Sharpe, Marina. *The Regional Law of Refugee Protection in Africa*. Oxford: Oxford University Press, 2018.
- Sharpe, Marina. "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions." *McGill Law Journal* 58, no.1 (2012): 95-147.
- Sidoti, Chris NHRIs and the International System, in *Human Rights State Compliance and Social Change* edited by Thomas Pegram and Ryan Goodman, 93-123. Cambridge: Cambridge University Press, 2011.

- Simion, Kristina. *Practitioner's Guide: Qualitative and Quantitative Approaches to Rule of Law Research*, (INPROL, 2016).
- Simmons, Beth. *Mobilizing for Human Rights*. Cambridge: Cambridge University Press, 2009.
- Simmons, Beth A. and Daniel J. Hopkins. "The Constraining Power of International Treaties: Theories and Methods." *American Political Science Review* 99 (2005): 623–31.
- Sinha, S. Prakash. *Asylum and International Law*. The Hague: Martinus Nijhoff, 1971.
- Smith, Anne. The Unique Position of National Human Rights Institutions: A Mixed Blessing? *Human Rights Quarterly* 28, no. 4 (November, 2006): 904-946.  
<https://www.jstor.org/stable/20072767>.
- SONKE. "Timeline of Complaint against DM Mkongi." Accessed 21 May, 2019.  
<https://genderjustice.org.za/publication/timeline-of-complaint-against-dm-mkongi/>
- Southern Africa Litigation Centre. *Submission by the Southern Africa Litigation Centre to the South African Human Rights Commission in Preparation for the National Hearing on Social Cohesion and Xenophobia in South Africa*. Accessed 19 August, 2019.  
<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/12/SALC-SAHRC-submission-2017-only.pdf>.
- Stankovic, Mirjana. "Compendium of International, Regional and National Legal Instruments on Forced Migration." The World Bank Group: May 2017.
- Stavropoulos, Vicky. "Refugee Protection in Turkey: Evaluating Needs and Challenges." *Chicago Policy Review*, (January 2, 2017).  
<http://chicagopolicyreview.org/2017/01/02/refugee-protection-in-turkey-evaluating-needs-and-challenges/>
- Steinerte, Elina. "African National Human Rights Institutions and the Protection of Asylum Seekers: Existing Practices and Opportunities Through the Optional Protocol to the UN Convention Against Torture." In *Regional Approaches to the Protection of Asylum Seekers: International Legal Perspectives*, edited by Ademola Abass and Francesca Ippolito, 87-112. London: Routledge, 2016.
- Taha, Dina. "Intersectionality and Other Critical Approaches in Refugee Research: An Annotated Bibliography," *Local Engagement Refugee Research Network Paper*, no. 3 (December 2019): 1-29.
- Takahashi, Saul. "Recourse to Human Rights Treaty Bodies for Monitoring the Refugee Convention." *Netherlands Quarterly of Human Rights* 20, no. 1 (2002): 53-74.
- Tesch, Renata. *Qualitative Research: Analysis Types and Software Tools*. New York: Falmer, 1990.
- Thamm, Mariann. "Report Reveals Shocking Levels of Corruption and Serial Abuse at

SA Refugee Centres,” in *the Daily Maverick*, 22 July 2015, <https://www.dailymaverick.co.za/article/2015-07-22-report-reveals-shocking-levels-of-corruption-and-serial-abuse-at-sa-refugee-centres/#.Wxf6ui-B18c>.

The Centre for Development and Enterprise (CDE). *Migration from Zimbabwe: Numbers, Needs and Policy Options*, Johannesburg: CDE, 2008.

The Daily Vox Team. “ADF: Home Affairs Comments on Asylum Seekers are Xenophobic.” *The Daily Vox*, February 13, 2018. <https://www.thedailyvox.co.za/home-affairs-comments-on-asylum-seekers-xenophobic/>.

The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*. Bethesda: The Commission, 1978. Accessed 31 October 2019. [https://videocast.nih.gov/pdf/ohrp\\_appendix\\_belmont\\_report\\_vol\\_2.pdf](https://videocast.nih.gov/pdf/ohrp_appendix_belmont_report_vol_2.pdf).

*The SowetanLive*. “Human Rights Watchdog to Participate in Review of SA report.” *The SowetanLive*, 6 March 2016. <https://www.sowetanlive.co.za/news/2016-03-06-human-rights-watchdog-to-participate-in-review-of-sa-report/>.

*TheWire*, “Government Blamed for Spate of Xenophobic Attacks.” *TheCitizen*, <https://citizen.co.za/news/south-africa/politics/2174326/government-blamed-for-spate-of-xenophobic-attacks/>.

Tlou, Joyce. “Speech by Non-Nationals Coordinator on Vulnerability of Migrants to Xenophobia, New York, 4 May 2011.” <https://www.sahrc.org.za/index.php/sahrc-media/news/item/34-speech-by-non-nationals-coordinator-on-vulnerability-of-migrants-to-xenophobia>.

Thipanyane, Tseliso. “Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and the Public Protector.” *New York Law School Law Review*, 60 (2015-2016): 125-151.

Triggs, Gillian. “The Independence of National Human Rights Institutions,” in *Humane Rights in 2016*, Future Leaders (2016): 48- 59.

Türk, Volker, and Madeline Garlick. “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees.” *International Journal of Refugee Law* 28, no. 4 (2016):656–678. <https://doi.org/10.1093/ijrl/cew043>.

Türk, Volker, and Rebecca Dowd. “Protection Gaps.” In *The Oxford Handbook of Refugee and Forced Migration Studies*, edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona, 1-16. Oxford: Oxford University Press, 2015.

Türk, Volker. “The Role of UNHCR in the Development of International Refugee Law.”

In *Refugee Rights and Realities: Evolving International Concepts and Regimes*, edited by Frances Nicholson and Patrick Twomey, 153-174. Cambridge: Cambridge University Press, 1999.

Türk, Volker. "UNHCR's Supervisory Role." *New Issues in Refugee Research, Working Paper No. 67*: 8-9. <http://www.unhcr.org/research/working/3dae74b74/unhcrs-supervisory-responsibility-volker-turk.html> .

US Bureau of Democracy, Human Rights and Labour. *Country Reports on Human Rights Practices: South Africa Country Reports 2009-2017*. Accessed June 7, 2018. <https://www.state.gov/j/drl/rls/hrrpt/index.htm> .

UCT Refugee Rights Unit. "Expanding the Protection Space for Refugees: Criminal Case Watching Briefs for Access to Justice for Refugee Victims of Crime." *Working Paper Series No. 2* (2011). Accessed June 10 2018. [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Papers\\_2\\_of\\_2011.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_2_of_2011.pdf) .

van Dyk, Joan. "Does South Africa need a Human Rights Commission?" *Bhekisa*. Accessed 6 September 2019. <https://bhekisisa.org/article/2018-07-04-00-power-and-crisis-why-sas-watchdogs-are-more-bark-than-bite/>),

Van Lennep, Tove, "The State of the South African Refugee Protection Regime: Part III – Party Politics." Dec 5 (2018). Accessed 10 June, 2019. <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-iii-party-politics>

Veridrame, Guglielmo. "Human Rights and Refugees: The Case of Kenya." *Journal of Refugee Studies* 2, no.1 (1999): 54-77. <https://doi.org/10.1093/jrs/12.1.54>

Vervliet, Marianne Jan De Mol, Eric Broekaert, and Ilse Derluyn. "That I Live, that's Because of Her': Intersectionality as Framework for Unaccompanied Refugee Mothers." *British Journal of Social Work* Vol. 44 (2014): 2023–2041. doi:10.1093/bjsw/bct060.

Vibhute, Khusal and Filipos Aynalem, *Legal Research Methods*. (2009). Accessed May 24, 2017. <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> .

Vidija, Patrick. "Don't Panic, Merger Won't Affect Roles: KNCHR tells NGEC and Ombudsman." Accessed June 11, 2018. [https://www.the-star.co.ke/news/2018/05/09/dont-panic-merger-wont-affect-roles-knchr-tells-ngec-and-ombudsman\\_c1755909](https://www.the-star.co.ke/news/2018/05/09/dont-panic-merger-wont-affect-roles-knchr-tells-ngec-and-ombudsman_c1755909).

Viljoen, Frans. "The African Human Rights and Domestic Enforcement," in *Social Rights Judgments and the Politics of Compliance: Making It Stick* edited by, Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi, 351-398. Cambridge: Cambridge University Press, 2017.

- Viljoen, Frans. *International Human Rights Law in Africa*, 2<sup>nd</sup> edition. Oxford: Oxford University Press: 2012.
- von Stein, Jana. "International Law: Understanding Compliance and Enforcement." 2010. <https://internationallawhiugm2016.files.wordpress.com/2016/02/jana-von-stein-compliance-enforcement-of-il.pdf>.
- Wall, Patrick. "A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?" *International Journal of Refugee Law* 29, Issue 2 (1 June 2017): 201-237. <https://doi.org/10.1093/ijrl/eex025>.
- Walker, Kristen The Importance of Being Out: Sexuality and Refugee Status, *Sydney Law Review* (1996): 568-597. <http://www.austlii.edu.au/au/journals/SydLawRw/1996/32.pdf>
- Wang, Hsing-Kuo Jung-Feng Tseng and Yu-Fang Yen. "How do Institutional Norms and Trust Influence Knowledge Sharing? An Institutional Theory, Innovation." *Innovation: Management, Policy & Practice* 16, no. 3 (2014): 374-391. doi:10.1080/14479338.2014.11081994.
- Welch, Ryan M. "Domestic Politics and the Power to Punish: The Case of National Human Rights Institutions." *Conflict Management and Peace Science* 36, 4 (2019): 385–404.
- Welch, Ryan. "National Human Rights Institutions: Domestic Implementation of International Human Rights Law," *Journal of Human Rights* 16, no.1 (2017): 96–116. <http://dx.doi.org/10.1080/14754835.2015.1103166>.
- Whitaker, Beth Elise. "Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania." *Working Paper No. 53*. Accessed May 7, 2018. <http://www.refworld.org/pdfid/4ff54fd22.pdf>.
- Willie, Ncumisa and Popo Mfubu. "No Future for our Children: Challenges Faced by Foreign Minors Living in South Africa." *African Human Mobility Review* 2, no.1, Jan-April 2016.
- Willie, Ncumisa and Popo Mfubu. "Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa." *African Human Mobility Review* 2, no.3 (2016): 544-566.
- Wisker, Gina. *The Postgraduate Research Handbook: Succeed with Your MA, MPhil, EdD and PhD*. London: Red Globe Press, 2008.
- Wolman, Andrew. "National Human Rights Institutions and the Courts in Asia-Pacific Region." *Asia Pacific Law Review* 19, no. 2 (2011): 237-252.
- World Bank. *The Global Concessional Financing Facility (GCFF)*. <https://globalcfff.org>.
- World Medical Association. "Declaration of Helsinki: Ethical Principles for Medical

Research involving Human Subjects.” *World Medical Association*, 1964. Last updated 2013. <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/>.

Yacob-Haliso, Olajumoke. “Intersectionality and Durable Solutions for Refugee Women in Africa.” *Journal of Peacebuilding & Development* 11, no.3 (2016): 53-67.  
DOI:10.1080/15423166.2016.1236698.

Yuval-Davis, Nira. *The Politics of Belonging: Intersectional Considerations*. London, SAGE Publications Ltd: 2011.

Zavratnik, Simona Sanja Cukut Krilić. “Addressing Intersectional Vulnerabilities in Contemporary Refugee Movements in Europe.” *Družboslovne Razprave*, XXXIV (2018): 85 – 106

Zille, Hellen. “SAHRC a Dumping Ground for ANC Cadres.” *Politicsweb*, 8 October, 2010.  
<http://www.politicsweb.co.za/about/sahrc-a-dumping-ground-for-anc-cadres--zille>

### **National Human Rights Institutions and Affiliations**

CGE. *Annual Report 2015/2016*. Johannesburg: CGE, 2016. [www.cge.org.za](http://www.cge.org.za).

CGE. *Chatsworth Report* (2015). Unpublished.

Danish Institute for Human Rights. *Guide to a Strategic Approach to Human Rights Education*. Copenhagen: DIHR, 2017.

GANHRI. “Chart of Accreditation Status, 2019.” Accessed January 10, 2020.  
<https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>.

GANHRI. *General Observations of the Sub-Committee on Accreditation*. GANHRI: Geneva, 2018.  
[https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf)

GANHRI. *National Human Rights Institutions and UN Treaty Bodies: Background Paper*. Geneva: GANHRI 2016

GANHRI, OHCHR and UNDP. *Global Principles for Capacity Assessment of NHRIs*. Geneva: GANHRI, 2016. <https://nhri.ohchr.org/EN/Documents/NHRIs-WEB.pdf>

GANHRI. *National Human Rights Institutions and United Nations Treaty Bodies*. Geneva: GANHRI, 2016.  
<https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Annual%20Meeting%20of%20Chairpersons%20of%20Human%20Rights%20Tre/GANHRI%20background%20paper%20FINAL.pdf>.

KNCHR. “Tribute to Hon. Ken Okoth (1978-2019): Message of Condolence on the Passing



of Hon. Ken Okoth, MP, Kibra Constituency.” *KNCHR*. Accessed 17 November 2019. <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1082/Tribute-Hon-Ken-Okoth-1978-2019>

KNCHR. *The Error of Fighting Terror with Terror*. Nairobi: KNCHR, 2018. <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/The%20Error%20of%20Fighting%20Terror%20With%20Terror.pdf?ver=2018-06-06-200137-237>

KNCHR. *KNCHR: Alternative Report to the Committee on Elimination of all Forms of Racial Discrimination, March 2017*. Nairobi: KNCHR, 2017.

KNCHR. “Submissions to the United Nations Permanent Forum on Indigenous Issues on Actions Taken or Planned Related to the Recommendations of the Permanent Forum, Implementation of UN Declaration on Indigenous Peoples and the Outcome Document of the World Conference on Indigenous Peoples.” Accessed June 10, 2018. [http://www.un.org/esa/socdev/unpfii/documents/2017/16-session/NHRIs/Kenya\\_Response.pdf](http://www.un.org/esa/socdev/unpfii/documents/2017/16-session/NHRIs/Kenya_Response.pdf).

KNCHR. *Annual Report, 2016/2017*. Nairobi: KNCHR, 2017.

KNCHR. *Handbook on Migration and Human Rights*. Nairobi: KNCHR, 2017.

KNCHR. *Annual Report 2015/2016*. Nairobi: KNCHR, 2016.

KNCHR. *Annual Report, 2014/2015*. Nairobi: KNCHR, 2015.

KNCHR. *Status on the Right to Safe Drinking Water and Sanitation in Kenya: Submission to the Special Rapporteur on the Right to Safe Drinking Water and Sanitation February, 2014*. Nairobi: KNCHR, 2014.

KNCHR. *Return of the Gulag: Report of KNCHR investigations on Operation Usalama Watch, July 2014*. Nairobi: KNCHR, 2014. <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20Operation%20Usalama%20Watch.pdf?ver=2018-06-06-194906-830>.

KNCHR. *Annual Report, 2013/2014*. Nairobi: KNCHR, 2014.

KNCHR. *Annual Report, 2012/2013*. Nairobi: KNCHR, 2013.

KNCHR. *It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights, July 2003-August 2011*. Nairobi: KNCHR, 2012. [https://www.knchr.org/Portals/0/GeneralReports/Its\\_Hard\\_to\\_be\\_Good.pdf?ver=2013-02-21-152535-707](https://www.knchr.org/Portals/0/GeneralReports/Its_Hard_to_be_Good.pdf?ver=2013-02-21-152535-707).

KNCHR. *Out of the Shadows: Towards ensuring the Rights of Stateless Persons and those at Risk of Statelessness in Kenya*. Nairobi: KNCHR, 2010. <https://www.unhcr.org/4e8338d49.pdf>.

KNCHR. *An Identity Crisis?: A Study on the Issuance of National Identity Cards in Kenya*.

- Nairobi: KNCHR 2007.  
<http://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf>
- KNCHR, “Disability Focal Point.” *KNCHR*. Accessed 3 June, 2019.  
<https://www.knchr.org/Our-Work/Research-and-Compliance/Disability>.
- KNCHR. “Migration and Human Rights.” *KNCHR*. Accessed 16 May, 2018.  
<https://www.knchr.org/Our-Work/Special-Interest-Groups/Rights-of-Migrants>.
- NGEC. *Annual Report 2017/2018*. Nairobi: NGEC, 2018.  
<https://www.ngeckenya.org/Downloads/NGEC%20Annual%20Report%202017-2018.pdf>
- NGEC. *Status of Equality and Inclusion in Kenya, 2016*. NGEC: Nairobi, 2016.
- NANHRI. *Migration in Africa: Promoting Respect of Fundamental Rights for Refugees and Migrants in Transit Camps*. Nairobi: NANHRI, 2018.
- NANHRI. *Report on the Sexual Orientation and Gender Identity and Human Rights Kenya In-Country Workshop, 29-30 May 2017*. NANHRI: Nairobi, 2017.
- NANHRI. “The African Commission on Human and Peoples’ Rights.” *NANHRI*. Accessed 14 June 2020. <https://www.nanhri.org/our-work/thematic-areas/cooperation-with-regional-human-rights-mechanism/>.
- NANHRI. *Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples’ Rights and Judgments of the African Court on Human and Peoples’ Rights*. Nairobi: NANHRI, 2016
- NANHRI. *Mapping Survey of Complaints Handling Systems of African National Human Rights Institutions*. Nairobi: NANHRI and UNDP, 2016.
- NANHRI. *The Role of National Human Rights Institutions in Conflict Management, Resolution and Peace Building: A Baseline Survey of the East African Situation*. Nairobi: NANHRI, 2016.
- NANHRI. *Study on the State of African NHRIs*. Nairobi: UNDP and NANHRI, 2016.
- NANHRI. *Preventing Torture in Africa: Lessons and Experiences from National Human Rights Institutions*. Accessed January 28, 2018. <http://www.nanhri.org/tag/association-for-the-prevention-of-torture-apt/>.
- NANHRI. *Kigali Declaration on Refugees, IDPs and Stateless Persons*, Kigali, Rwanda, 10 Oct 2007. Accessed April 18, 2018. <http://www.nanhri.org/download/kigali-declaration/>.
- NANHRI. *NANHRI Member Profiles*. NANHRI, 2014.



- NANHRI. "The African Commission on Human and Peoples' Rights." *NANHRI*. <https://www.nanhri.org/our-work/thematic-areas/cooperation-with-regional-human-rights-mechanism/>. Accessed 14 June 2020.
- Public Protector. *Report on an Investigation into Allegations of Undue Delay, Unlawful and Improper Conduct and Prejudice in the Rendering of Services at Braamfontein Refugee Reception Centre (now Rosettenville premises): Report in Terms of Section 182(1) (b) of the Constitution of the Republic of South Africa Act 108 of 1996, and Section 8(1) of the Public Protector Act, 23 of 1994, October 12, 2004.*
- SAHRC. "Media Advisory: The Acting Director-General of the Department of Home Affairs Subpoenaed to Appear before the South African Human Rights Commission on Thursday 16 May 2019." *SAHRC*. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1911-media-advisory-the-acting-director-general-of-the-department-of-home-affairs-subpoenaed-to-appear-before-the-south-african-human-rights-commission-on-thursday-16-may-2019>
- SAHRC. "Media Statement: SAHRC Condemns Attacks on Non-Nationals." *SAHRC*, April 1, 2019. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1827-media-statement-sahrc-condemns-attacks-on-non-nationals>.
- SAHRC. "Media Statement: SAHRC Welcomes the Cabinet Decision on the Ratification of OPCAT." *SAHRC*, 4 March 2019. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1786-media-statement-sahrc-welcomes-the-cabinet-decision-on-the-ratification-of-opcat>
- SAHRC. "Terms of Reference: SAHRC Organisational Renewal: Culture Change Management Project." *SAHRC*, February 2019.
- SAHRC. "Media Statement: SAHRC Welcomes the Cabinet Decision on the Ratification of OPCAT," 4 March 2019. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1786-media-statement-sahrc-welcomes-the-cabinet-decision-on-the-ratification-of-opcat>.
- SAHRC. *Report of the Africa Human Rights Day Dialogue*, 24 October 2018. East London: SAHRC, 2018.
- SAHRC, "SA Legislation on Migrants Takes Wrong Path." *SAHRC*, 26 June 2018. <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1416-sa-legislation-on-migrants-takes-wrong-path>.
- SAHRC. "Panel Discussion: Securitisation of Migration and its Impact on Refugees." *SAHRC*, 26 June 2018. <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1416-sa-legislation-on-migrants-takes-wrong-path>.
- SAHRC. "Medical Xenophobia-Public Hospitals Deny Migrants Healthcare Services." *SAHRC*. Accessed May 31, 2018. <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1229-medical-xenophobia-public-hospitals-deny-migrants-health-care-services-sahrc>.

SAHRC. "SAHRC: The National Dialogue on Social Cohesion, Xenophobia and Migration, 7-8 February 2018." *SAHRC*. Accessed 19 August, 2019.

SAHRC. *Annual Report 2017/2018*. Johannesburg: SAHRC, 2018.

SAHRC, "Children Illegally Detained under Bosasa's Watch at Lindela as Healthcare Crumbles." *SAHRC*, 13 Dec 2017.

SAHRC. "Media Statement: SAHRC Concerned by Xenophobic Statements of Leaders." SAHRC, 17 July, 2017. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/736-sahrc-concerned-by-xenophobic-statements-of-leaders>.

SAHRC. "Equality Court Ruling Protecting Rights of Asylum Seeker." SAHRC, 5 July 2017.

SAHRC. "Media Statement: Sonke and Lawyers for Human Rights Welcome the Deputy Minister of Police's Statement on Unintended Consequences of Public Statements He Made in July 2017." *SAHRC*. Accessed 10 May 2019. <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1520-sonke-and-lawyers-for-human-rights-welcome-the-deputy-minister-of-police-s-statement-on-unintended-consequences-of-public-statements-he-made-in-july-2017>

SAHRC. *Trends Analysis Report 2016/2017*. Johannesburg: SAHRC, 2017. <https://www.sahrc.org.za/home/21/files/SAHRC%20Trend%20Analysis%202016%20-%202017.pdf>.

SAHRC. "SAHRC Submission: Response to the ISD Questionnaire on a Single Human Rights Body (South African Commission for Human Rights and Equality)." *SAHRC*, June 2017. <https://www.sahrc.org.za/home/21/files/SAHRC%20Submission-%20Response%20to%20ISD%20Questionnaire%20Single%20Human%20Rights%20Body-FINAL-%20June%202017.pdf>.

SAHRC. "National Human Rights Institution Report on the South African Government's Combined Fourth to Eight Periodic Country Report under the International Convention on the Elimination of Racial Discrimination, August, 2016." Accessed 18 June, 2017. <https://www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20REPORT%20TO%20CERD-%20FINAL%2025.7.16.pdf>.

SAHRC. "South African Human Rights Commission: List of Issues Report to the Human Rights Committee on South Africa's Implementation of the International Covenant on Civil and Political Rights, April 2015." Accessed 18 June 2017. [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT\\_CCPR\\_I\\_CO\\_ZAF\\_20239\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_I_CO_ZAF_20239_E.pdf)

SAHRC. "Media Statement: SAHRC Condemns Xenophobic Attacks on Foreign Nationals." *SAHRC*, 17 April, 2015. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/318-media-statement-sahrc-condemns-xenophobic-attacks-on-foreign-nationals>.

SAHRC, "Forum of Institutions Supporting Democracy in South Africa Unequivocally

Condemns Attacks on Foreign Nationals,” Joint Media Statement by the Forum of Institutions Supporting Democracy, Friday, 17 April 2015, *SAHRC*, accessed 26 June 2020, <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/319-forum-of-institutions-supporting-democracy-in-south-africa-unequivocally-condemns-attacks-on-foreign-nationals>.

SAHRC. *Annual Report 2013/2014*. Johannesburg: SAHRC, 2014.

SAHRC. *Annual International Report, 2011*. Johannesburg: SAHRC, 2012.

SAHRC, *Annual Report, 2011/2012*. Johannesburg: SAHRC, 2012.

SAHRC. *Critically Reflecting on an Institutional Journey 2002-2009: The South African Human Rights Commission*. Johannesburg: SAHRC, 2010.

SAHRC. *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-nationals*. Johannesburg: SAHRC, 2010.

<https://www.sahrc.org.za/home/21/files/Report%20on%20the%20SAHRC%20Investigation%20into%20Issues%20of%20Rule%20of%20Law,%20Justice%20and%20Impunity%20arising%20out%20of%20the%202008%20Public%20Violence%20against%20Non-Nationals.pdf>

SAHRC. *Lindela Investigative Report*. Johannesburg: SAHRC, 2009.

<http://www.sahrc.org.za/construction-site/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lindela%20-%201%20September%202014.pdf>

SAHRC. *Lindela: At the Crossroads for Detention and Repatriation*. Johannesburg: SAHRC, 2000. [http://www.gov.za/sites/www.gov.za/files/lindela2\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/lindela2_0.pdf).

SAHRC. *Annual Report 1998/1999*. Johannesburg: SAHRC, 1999.

SAHRC. “Parliamentary and International Affairs Unit.” *SAHRC*. Accessed 9 June, 2019. <https://www.sahrc.org.za/index.php/what-we-do/programmes>.

SAHRC. “Submissions on Legislation.” *SAHRC*. Accessed 9 June, 2019. <https://www.sahrc.org.za/index.php/sahrc-publications/submission-on-legislation>

SAHRC. “Section 184 (3) Reports (ECOSOC reports).” *SAHRC*. Accessed 12 May, 2018. [www.sahrc.org.za](http://www.sahrc.org.za)

## League of Nations

League of Nations. *Treaty Series*, Vol. XXX, 1922, No. 855: 238-242 Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees signed at Geneva, July 5, 1922.

League of Nations. *Treaty Series*, Vol. LXXXIX, 1929, Nos. 2004: 48-52

Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 5, 1922 and May 31, 1924. Signed at Geneva, June 30, 1928.

League of Nations. *Treaty Series*, Vol. LXXXIX, 1929, No. 2005: 55-61 Arrangement relating to the Status of Russian and Armenian Refugees. Signed at Geneva, June 30, 1928.

League of Nations. *Treaty Series*, Vol. LXXXIX, 1929, No. 2006: 65-67 Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees. Signed at Geneva, June 30, 1928.

League of Nations. *Treaty Series*, Vol. LXXXIX, No. 2005. Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees. Available at <http://www.refworld.org/pdfid/3dd8cde56.pdf>.

League of Nations. *Convention relating to the International Status of Refugees*. Vol 159, No 3663 (adopted 28 October 1933, entered into force 13 June 1935).

League of Nations. *Treaty Series* Vol. CLIX, No 3663.

## United Nations

Commission on Human Rights. "Human Rights and Mass Exoduses." 1996/51, 1997/75.

International Labour Organization. *Access to Work for Syrian Refugees in Jordan: A Discussion Paper on Labour and Refugee Laws and Policies* 11–12 (2015). <https://data.unhcr.org/syrianrefugees/download.php?id=8919>.

International Organization for Migration. *Study on Unaccompanied Migrant Children in Mozambique, South Africa, Zambia and Zimbabwe*. Pretoria: IOM, 2017.

OHCHR. *Evaluation of OHCHR Support to National Human Rights Institutions*. Geneva: OHCHR, 2015.

OHCHR. *OHCHR Training Manual on Human Rights Monitoring*. OHCHR: Geneva, 2011.

OHCHR. *Report of the Working Group of the UPR: Kenya*. UN Doc A/HRC/15/8, 15 June 2010.

OHCHR. *National Human Rights Institutions: History, Principles, Roles and Responsibilities*. Geneva: United Nations, 2010.

OHCHR. *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

OHCHR. *Universal Human Rights Index*. <https://uhri.ohchr.org/en/search/results>.

OHCHR. "OHCHR and NHRIs." Accessed 30 May, 2020.

<https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>

UN. *Report of the Forty-eighth Session of the Executive Committee of the High Commissioner's Programme*, Geneva 13-17 October 1997. UN Doc A/AC.96/895 (20 Oct 1997) paras 18-22. Accessed 12 April 2018.

[http://repository.un.org/bitstream/handle/11176/143531/A\\_AC.96\\_895-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/143531/A_AC.96_895-EN.pdf?sequence=3&isAllowed=y)

UN. "Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees," A/73/12 (Part II), [https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf) (GCR).

UN. *Global Compact on Refugees*. Accessed 7 May 2018.

<https://refugeesmigrants.un.org/refugees-compact>

UN. "New York Declaration for Refugees and Migrants," UN Doc A/RES/71/1, 3 October 2016. Accessed 8 October, 2017. <http://refugeesmigrants.un.org/new-york-declaration-refugees-and-migrants-ares711>.

UN. "Convention on the Rights of Persons with Disabilities." Accessed February 26, 2018.

[http://www.un.org/disabilities/documents/convention/convention\\_accessible\\_pdf.pdf](http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf)

UN. "Beijing Declaration and Programme of Action." Accessed 7 July 2017.

<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

UN. "World Conference on Human Rights: Vienna Declaration and Programme of Action." A/CONF.157/23. Accessed 18 April, 2017. <http://www.un-documents.net/ac157-23.htm>.

UN. "Protocol Relating to the Status of Refugees." *Treaty Series* 606, no. I-8791.

UN. "Statute of the Office of the High Commissioner for Refugees." *UN General Assembly Resolution 428 (V) of 14 December 1950 at Article 8*. Accessed 3 May 2018.

[http://www.un.org.my/un\\_treaties.aspx](http://www.un.org.my/un_treaties.aspx).

UN. "Convention Relating to the Status of Refugees." *Treaty Series* 189, no. I-2545.

UN. "ECOSOC Resolution 9 (II), 21 June 1946." Accessed 18 April, 2017.

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/56/REV.2](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/56/REV.2).

UN. "United Nations Declaration on Human Rights Education and Training."

UN. CEDAW/C/LBN/CO/4-5 (2015) paras 11–12.

UN CEDAW. *General Recommendation No. 32 on the Gender-related Dimensions of*

*Refugee Status, Asylum, Nationality and Statelessness of Women*, 5 November 2014, CEDAW/C/GC/32. Accessed 18 April 2018.  
<http://www.refworld.org/docid/54620fb54.html>.

UN CEDAW. *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28. Accessed 10 June 2020.  
<https://www.refworld.org/docid/4d467ea72.html>.

UN CEDAW. Statement by the Committee on the Elimination of Discrimination against Women on its Relationship with National Human Rights Institutions, E/CN.6/2008/CRP.1. Accessed 27 February, 2018.  
<http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/StatementOnNHRIs.pdf>.

UN CERD. *General Recommendation 17, the Establishment of National Institutions to Facilitate the Implementation of the Convention* (Forty-second session, 1993), UN Doc. A/48/18 at 116 (1994). Accessed 26 February 2018.  
<http://hrlibrary.umn.edu/gencomm/genrxvii.htm>.

UN CERD. “Concluding Observations on the Fifth and Seventh Periodic Reports of Kenya.” CERD/C/KEN/CO/5-7, 8 June 2017.  
[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/KEN/CO/5-7&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/KEN/CO/5-7&Lang=En).

UN CERD. “Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa.” CERD/C/ZAF/CO/4-8, 5 October 2016.  
<https://www.refworld.org/docid/597b13e44.html>.

UN Committee on Enforced Disappearances. *The Relationship of the Committee on Enforced Disappearances with National Human Rights Institutions*, CED/C/6, 28 October 2014. Accessed on 27 February 2018.  
[http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1\\_Global/CED\\_C\\_6\\_7527\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/CED_C_6_7527_E.pdf).

UN General Assembly. “*Note on International Protection*.” 7 September 1994. A/AC.96/830, para. 32. Accessed April 3, 2018. <http://www.refworld.org/docid/3f0a935f2.html>.

UN General Assembly. “Principles relating to the Status of National Institutions (The Paris Principles.” Resolution 48/134 of 20 December 1993. Accessed May 31, 2018.  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

UN Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4 at para. 39, UN Doc. HR/P/PT/4, UN Sales No. E.95.XIV.2 (1995).

UNDP. *Study on the State of National Human Rights Institutions (NHRIs) in Africa*. New York: UNDP, 2016.



- UNDP. "Report on Mid Term Evaluation on UNDP's Realization of Human Rights and Access to Justice in Kenya Programme, 2014."  
[https://info.undp.org/docs/pdc/Documents/KEN/Mid%20Term%20Review\\_Final%20Report%20\(2014\).pdf](https://info.undp.org/docs/pdc/Documents/KEN/Mid%20Term%20Review_Final%20Report%20(2014).pdf).
- UNHCR Kenya. "Monthly Operational Update, September 2019." Accessed 20 December, 2019.  
<https://www.unhcr.org/ke/wp-content/uploads/sites/2/2019/10/Operational-update-September-2019-Nairobi-and-Urban-areas.pdf>.
- UNHCR. *Global Trends; Forced Displacement in 2018*. Geneva: UNHCR, 2019. Accessed January 15, 2020. <https://www.unhcr.org/5d08d7ee7.pdf>.
- UNHCR. "UNHCR's 2018-2019 Financial Requirements."  
[http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter\\_Financial.pdf](http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter_Financial.pdf)
- UNHCR. *UNHCR Statistical Yearbook 2017*. Geneva: UNHCR, 2018.
- UNHCR. "Sharing Responsibilities for Large Refugee Movements, Statement by Ariane Rummery." *UNHCR Spokesperson*, Geneva 7 July 2017. Accessed May 8, 2018 <http://www.unhcr.org/news/briefing/2017/7/595f41694/sharing-responsibilities-large-refugee-movements.html>.
- UNHCR. "Open Briefing by Volker Türk, Assistant High Commissioner for Protection Presented to the United Nations Security Council Counter-Terrorism Committee." New York, 5 April 2017. Accessed April 18, 2018. [https://www.un.org/sc/ctc/wp-content/uploads/2017/04/UNHCR-Speech\\_Asylum-Briefing-5-April-2017.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2017/04/UNHCR-Speech_Asylum-Briefing-5-April-2017.pdf)
- UNHCR, *Towards a Global Compact on Refugees*. Accessed 8 October 2017.  
<http://www.unhcr.org/towards-a-global-compact-on-refugees.html>
- UNHCR. *Mid-Year Trends 2016*. Accessed 15 May, 2017.  
[www.unhcr.org/statistics/unhcrstats/58aa8f247/mid-year-trends-june-2016.html](http://www.unhcr.org/statistics/unhcrstats/58aa8f247/mid-year-trends-june-2016.html).
- UNHCR. "UNHCR Engagement with National Human Rights Institutions for IDP Protection: Stocktaking Exercise (A Checklist for Engagement with NHRIs)." February 2016. Accessed 9 July, 2018.  
<https://www.refworld.org/docid/571a19194.html>.
- UNHCR. *Asylum Lawyers Project*, November 2016. <https://www.unhcr.org/en-us/5822266c4.pdf>.
- UNHCR. *UNHCR Operation in South Africa, Lesotho and Swaziland Factsheet*, September 2015. Accessed 14 May, 2019. <https://www.unhcr.org/524d87689.pdf>.
- UNHCR. *Protection from Xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes*. UNHCR: Johannesburg, 2015.
- UNHCR. "UNHCR in South Africa: Presentation to the Parliamentary Portfolio

Committee of Home Affairs.” *UNHCR*, 11 November 2014.

UNHCR. *UNHCR Seeking Access to Detained Asylum-seekers and Refugees in Nairobi*, 7 April 2014. Accessed 8 September 2018. <https://www.unhcr.org/5342b35d9.html>

UNHCR. “Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013.” Accessed July 3, 2018. <http://www.refworld.org/docid/5285e0294.html> .

UNHCR. “Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report-Universal Periodic Review: South Africa.” *UNHCR*, November 2011. <http://www.refworld.org/docid/4ed724952.html>.

UNHCR. *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report-Universal Periodic Review: KENYA*. Geneva: UNHCR, 2011.

UNHCR. *Navigating Nairobi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in Kenya’s Capital*. Geneva: UNHCR, 2011.

UNHCR. “Combating Racism, Racial Discrimination, Xenophobia and related Intolerance through a Strategic Approach.” Geneva: UNHCR, Dec 2009. <https://www.refworld.org.ru/pdfid/4b30931d2.pdf>

UNHCR. *An Introduction to International Protection*. Geneva: UNHCR, 2005.

UNHCR, *UNHCR Global Appeal, 2005: South Africa*. Geneva: UNHCR, 2004: 190-193 <https://www.unhcr.org/41ab28e88.pdf>

UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 7 May 2002 <https://www.unhcr.org/3d58ddef4.pdf>

UNHCR, “UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender: Using international law to support claims from women seeking protection in the U.S.”

UNHCR. *Refugee*1, no.122 (2001):16.

UNHCR. “State Parties to the 1951 Refugee Convention Relating to the Status of Refugees and the 1967 Protocol.” Accessed June 10 2018. <http://www.unhcr.org/afr/3b73b0d63.pdf>.

UNHCR. “Summary Report of the Expert Workshop on Human Rights and Refugees, ‘Human Rights Violations, Persecution and Non-state Agents’, Athens, 18-20 Dec. 1998.”



UNHCR. "Submission to the Public Hearings on Xenophobia, held Jointly by the Parliamentary Portfolio Committee on Foreign Affairs and the South African Human Rights Commission."

UNHCR. "Executive Committee Conclusion No 81, "General Conclusion on International Protection. (1997)." Accessed April 17, 2018.  
<http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>.

UNHCR. "Remarks by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the United Nations Security Council, New York, 28 April 1997." Accessed 7 May 2018.  
<http://www.unhcr.org/afr/admin/hcspeeches/3ae68fbb1c/remarks-mrs-sadako-ogata-united-nations-high-commissioner-refugees-united.html>.

UNHCR. "ExCom Conclusion, General Conclusion on International Protection." 77 (XLVI) 1995.

UNHCR. "The Basic Agreement Between the Government of the Republic of South Africa and United Nations High Commissioners for Refugees (UNHCR), 6 September 1993 cited in Executive Committee of UNHCR 48<sup>th</sup> Session." Accessed June 10, 2018.  
<http://www.unhcr.org/4a51bb9c9.pdf>.

UNHCR. "The Basic Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in the Republic of South Africa. (1991 Basic Agreement)." Accessed May 28, 2018. <http://www.refworld.org/docid/3ee726024.html>

UNHCR. "Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees." EC/SCP/66, 22 July 1991 (UN Doc. EC/SCP/66.)

UNHCR. "Cartagena Declaration on Refugees." <http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>.

UNHCR. "The Executive Committee's Origins and Mandate." Accessed April 17, 2018.  
<http://www.unhcr.org/executive-committee.html>.

UNHCR. "Guidelines on Temporary Protection or Stay Arrangements." <http://www.unhcr.org/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html>

UNHCR. "Note on International Protection 27." *UN. Doc. A.AC.96/623*, 31 July 1983.

UNHCR. "Convention Relating to the Status of Refugees." *UN Treaty Series*.

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-2-10&chapter=3&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2-10&chapter=3&clang=en).

UNHCR. “*Implementing Partners, Kenya*.” UNHCR. Accessed 20 December, 2019.  
<https://www.unhcr.org/ke/unhcr-partners-kenya>.

UNHCR. *Asylum Seekers*. UNHCR. Accessed 15 May, 2017.  
<http://www.unhcr.org/asylum-seekers.html>

UNHCR. “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.” UNHCR. Accessed 30 January, 2020.  
<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

UN Human Rights Committee. “The Relationship of the Human Rights Committee with National Human Rights Institutions, adopted by the Committee at its 106<sup>th</sup> session.” 15 October–2 November 2012. Accessed 27 February 2018.  
[CCPR/C/106/3. http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en)

UN Human Rights Committee. “General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.” CCPR/C/21/Rev.1/Add.13, 26 May 2004, . Accessed 17 April, 2018.  
<http://www.refworld.org/docid/478b26ae2.html>.

UN Human Rights Committee. “General Comment No. 20 Prohibition of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (Article 7).” 1992.

UNICEF. *General Comments of the Committee on the Rights of the Child*. Florence: UNICEF, 2006.

UN/A/ RES/66/137 *United Nations Declaration on Human Rights Education and Training*. Accessed 4 September 2019. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf?OpenElement>.

UN Women. “What is Human Rights Monitoring.” Last edited December 21, 2011.  
<http://www.endvawnow.org/en/articles/994-what-is-human-rights-monitoring.html>

## **UN Resolutions on National Human Rights Institutions**

UN Commission on Human Rights. “Resolution on National Institutions in the Field of Human Rights; Annex: Some possible functions which could be performed by national institutions in the field of human rights, if so decided by the Government concerned.” CHR Res. 23(XXXIV) of 1978, Mar. 8, 1978.

UN General Assembly. “National Institutions for the Promotion and Protection of Human Rights.” A/RES/70/163, December 2015.

UN General Assembly. “Principles Relating to the Status of National Institutions (Paris

Principles).” *A/RES/48/134*, 1993. Accessed May 17, 2017.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

## African Union

AU. *Convention Governing the Specific Aspects of Refugee problem in Africa* (1969 Refugee Convention) (entered into force 20 June 1974)

<http://www.achpr.org/instruments/>

AU. “African Charter on Human and Peoples’ Rights.” <http://www.achpr.org/instruments/>

AU. “African Charter on the Rights and Welfare of the African Child.”

[http://www.achpr.org/files/instruments/child/achpr\\_instr\\_charterchild\\_eng.pdf](http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf)

AU. “Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.” [http://www.achpr.org/files/instruments/women-](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf)

[protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf).

AU. “List of Countries which wave Signed, Ratified/Acceded to the OAU Convention Governing The Specific Aspects of Refugee Problems in Africa.” *AU*. Accessed 30 January 2020 [https://au.int/sites/default/files/treaties/36400-sl-](https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf)

[OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf](https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf).

ACHPR. “Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa - ACHPR/Res.370(LX)2017.” *ACHPR*. Accessed 13 June 2020.

<https://www.achpr.org/sessions/resolutions?id=412>

ACHPR. “Press Release on Publication of New Rules of Procedure of the African Commission on Human and Peoples’ Rights, 2020.” *ACHPR*, July 7 2020. Accessed 12 July, 2020. <https://www.achpr.org/pressrelease/detail?id=518>.

ACHPR. “Ratification Table: AU Convention Governing Specific Aspects of the Refugee Problem in Africa.” Accessed 10 June 2018.

<http://www.achpr.org/instruments/refugee-convention/ratification/>

ACHPR, “Memorandum of Understanding between ACHPR and the UNHCR,” 2012.

<https://www.achpr.org/presspublic/publication?id=23>. Accessed 28 May 2020.

ACHPR. “Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa.” *ACHPR/Res. 370 (LX) 2017*.

ACHPR. “Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa (1998), ACHPR/Res.31/(XXIV) 98 (NHRI Resolution).”

ACHPR. “Resolution on Burundi.” *ACHPR/Res.24(XIX)96*.

- ACHPR. "Resolution on Darfur." *ACHPR/Res.68(XXXV)04*.
- ACHPR. "Resolution on Human and Peoples' Rights Education." *ACHPR/Res.6(XIV)93*.
- ACHPR. "Resolution on Migration and Human Rights." *ACHPR/Res.114 (XXXII) 07*.
- ACHPR. "Resolution on Sudan." *ACHPR/Res.15(XVII)95*.
- ACHPR. "Resolution on the Human Rights Situation in Africa." *ACHPR/Res.14(XVI)94*.
- ACHPR. "Resolution on the Human Rights Situation in Côte d'Ivoire." *ACHPR/Res.182(EXT.OS/IX)2011*.
- ACHPR. "Resolution on the Observance of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugees in Africa." *ACHPR/Res.43 (XXVI)99*.
- ACHPR. "Resolution on the Right to Nationality." *ACHPR/Res.234 (2013)*.
- ACHPR. "Resolution on the Situation of the North of the Republic of Mali." *ACHPR/Res.217(XXXXXI)2012*.
- ACHPR. "Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs." *ACHPR/Res.72 (XXXVI)*.
- ACHPR. "National Human Rights Institutions," *ACHPR*. Accessed 14 June 2020. <https://www.achpr.org/nhris>.
- ACHPR. "Special Rapporteur on Refugees, Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa." *ACHPR*. <https://www.achpr.org/specialmechanisms/detail?id=5>. Accessed 14 June 2020

### European Union

European Commission. *EU-Jordan Partnership: The Compact, 2016 (Jordan Compact)*. Accessed 28 April 2018. <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/jordan-compact.pdf>

### Cases

- A.M. (on behalf of K.Y.M.) v Denmark, communication No. 3/2016, CRC/C/77/D/3/2016*, UN Committee on the Rights of the Child (CRC), 25 January 2018.
- Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA)
- Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC)
- Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209
- Centre for Child Law and 25 Others v Minister of Education and 4 Others* 2019 (2840/2017) ZAECGHC 126.
- Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 487 (CC)

*Economic Freedom Fighters v Speaker of the National Assembly and Others* 2018 (2) SA 571 (CC)

*Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)

*Ersumo v Minister of Home Affairs* (69/2012) [2012] ZASCA 31

*Hafiz Saddiq v Department of Labour*, Unreported, Equality Court Case No. EQ 04/2017

*Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 5 SA 550 (WCC).

*Hussein and Another v the Additional Magistrate, Cape Town and Others*, High Court of South Africa, Western Cape Division. Case No.152888/14

*Kenya National Commission on Human Rights & another v Attorney General & 3 others*, [2017] eKLR.

*Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C)

*Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR 2 (Kituo Cha Sheria)  
*Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR

*Lukombo v Minister of Home Affairs and Others* (2013/13552) [2013] ZAGPJHC 142

*Minister of Home Affairs v Saidi* (294/2016) [2017] ZASCA 40

*Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC)

*Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 (3) SA 545 (SCA)

*Minister of Home Affairs v Dominique Liebenberg*, 2002 (1) SA 33 (CC)

*MT v Refugees Appeal Board and Others*, GP /415/0433

*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC)

*Ngona v Minister of Police* (9198/2010) [2012] ZAWCHC 325

*Power v Minister of Home Affairs and Others* (2013/14516) [2013] ZAGPJHC 146

*Samow & Others v Cabinet Secretary & Others* [2014] eKLR

*Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017)

*South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* 2014 (11) BCLR 1352 (GJ)

*SAHRC, MSF, Section 27, LHR & PASSOP v DHA, National Department of Health, Bosasa Operations (PTY) Ltd., SAPS & DIRCO*, GP 2012/0134

*Tafira and six others v Ngozwane & 5 others*. Unreported, High Court of South Africa, Transvaal Provincial Division. Case No. 12960/06

The African Commission on Human and Peoples' Rights Communication - 276/03-Endorois case

## **Legislation**

### **South Africa**

Aliens Control Act No 96 of 1991  
 Constitution of the Republic of South Africa Act 200 of 1993  
 Human Rights Commission Act No. 54 of 1994  
 Immigration Act No. 13 of 2002  
 Immigration Amendment Act No. 19 of 2004  
 Immigration Amendment Act No. 13 of 2011  
 Promotion of Access to Information Act No. 2 of 2000  
 Promotion of Equality and Prevention of Unfair Discrimination Act No.3 of 2000  
 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, Regulations, 2003  
 Refugee Act No. 130 of 1998  
 Refugee Amendment Act No. 33 of 2008  
 Refugee Amendment Act No. 12 of 2011  
 Refugee Amendment Act No. 10 of 2015  
 Refugee Amendment Act No. 11 of 2017  
 South African Human Rights Commission Act No. 40 of 2013  
 Regulations to the South African Refugees Act, No. R366, 6 April 2000

### **Kenya**

Aliens Restriction Act No. 5 of 1973  
 Commission on Administrative Justice Act No. 23 of 2011  
 Constitution of Kenya, 2010  
 Constitution of Kenya of 1963 as amended in 2008  
 Independence Policing Oversight Authority Act, 2011  
 Immigration Act No. 25 of 1967  
 Kenya National Commission on Human Rights Act No.14 of 2011  
 Kenya National Commission on Human Rights Act No. 9 of 2002  
 National Gender and Equality Commission Act No. 15 of 2011  
 Refugees Act No. 13 of 2006  
 Refugees (Reception, Registration And Adjudication) Regulations, 2009 [L.N. No 24/2009.]  
 Refugees Bill 2019  
 Refugees Bill 2016  
 Security Laws (Amendment) Act No. 19 of 2014

### **Rwanda**

Law No 61/2018 of 24/08/2018 Modifying Law No 19/2013 OF 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights (Official Gazette no 38 of 17/09/2018)

### **Zimbabwe**

Zimbabwe Constitution, Chapter 12, sections 232-244 of the Constitution.

### **Websites**

CoRMSA. “What We Do.” *CoRMSA*. Accessed 1 July 2020. <https://www.cormsa.org.za>.

Kenyalaw.org. <http://kenyalaw.org/kl/>.

LegislationOnline. *UN Standards on NHRIs*. Accessed 28 February 2018. <http://www.legislationonline.org/topics/organisation/2/topic/82>.

Refworld. Accessed 18 April 2018. <http://www.refworld.org/publisher/CRC.html>.

Reliefweb. “The Jordan Compact: A New Holistic Approach between the Hashemite Kingdom of Jordan and the International Community to deal with the Syrian Refugee Crisis.” Accessed 7 May 2018. <https://reliefweb.int/report/jordan/jordan-compact-new-holistic-approach-between-hashemite-kingdom-jordan-and>.

## Appendix 1: UCT Ethics Clearance



### Faculty of Law

#### Research Ethics Committee

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24 April 2018

**Ms Vivian Nasaka John-Langba**

*c/o Department of Public Law*

Level 6, Faculty of Law

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#### Contact information

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Dear Ms John-Langba

***Re: Clearance Process Report for L0075-2018: "The Role of National Human Rights Institutions in Promoting and Protecting the Rights of Refugees: The Case of South Africa and Kenya"***

Thank you for your revised application submitted. The Law Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and confirm that all ethical issues have been adequately addressed.

**Ethics clearance is hereby granted as of 24 April 2018 for a period of 12 months** and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

*Please do quote reference number above on all communication to the committee.*

With best wishes,

**Dr Kelley Moulton**

**CHAIRPERSON: REC LAW FACULTY**

*cc: Prof R Manjoo (Supervisor: PBL Dept, UCT)*



## Appendix 2: Research authorisation-Kenya



### NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

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Ref. No. **NACOSTI/P/18/58573/23088**

Date: **17<sup>th</sup> October, 2018**

Vivian Nasaka Makunda  
University of Cape Town  
**SOUTH AFRICA.**

#### **RE: RESEARCH AUTHORIZATION**

Following your application for authority to carry out research on *“The role of National Human Rights Institutions in promoting and protecting the rights of refugees: The case of South Africa and Kenya”* I am pleased to inform you that you have been authorized to undertake research in **all Counties** for the period ending **12<sup>th</sup> October, 2019.**

You are advised to report to **the Chief Executive Officers of selected government agencies, the County Commissioners and the County Directors of Education, all Counties** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit **a copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.

**BONIFACE WANYAMA**  
**FOR: DIRECTOR-GENERAL/CEO**

Copy to:

The Chief Executive Officers  
Selected government agencies.

The County Commissioners  
All Counties.

*National Commission for Science, Technology and Innovation is ISO9001:2015 Certified*

### Appendix 3: Sample Letter of Introduction



UNIVERSITY OF CAPE TOWN  
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

3<sup>rd</sup> September 2018

The Director,

Dear ...,

**RE: PERMISSION TO CONDUCT INTERVIEWS FOR DOCTORAL RESEARCH STUDY**

My name is Vivian John-Langba. I am a PhD student in the Faculty of Law at the University of Cape Town, South Africa. For my doctoral research, I am conducting a study on refugee protection in South Africa and Kenya. The aim of this study is to *explore the nature and extent of the role of national human rights institutions (NHRIs) within the refugee protection regimes using South Africa and Kenya as case studies.*

I would like to request permission to recruit individuals from your organisation for key informant interviews. These would be individuals knowledgeable about refugee protection in South Africa.

The timeline for my fieldwork is [insert date]. I would be grateful if I could receive feedback by [insert date] about the possibility of conducting the interviews.

Attached herewith is the ethical approval letter for the study from the Research Ethics Committee of the University of Cape Town, South Africa. **[Attached as well is the research authorisation from NACOSTI]**. If you require any additional information or clarification, please contact me on: .... or email: .....

I look forward to hearing from you.

Sincerely,

Vivian N. John-Langba

## **Appendix 4: Information Sheet and Consent Form**

### **INFORMATION SHEET AND CONSENT FORM**

#### **RESEARCH PROJECT TITLE: THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PROMOTING AND PROTECTING THE RIGHTS OF REFUGEES: THE CASE OF SOUTH AFRICA AND KENYA**

My name is Vivian Nasaka John-Langba and I am a PhD candidate from the University of Cape Town in South Africa. I am trying to understand how national human rights institutions such as the Human Rights Commission support and defend the rights of refugees and the challenges that these institutions may face in doing their work. In order to do this, I will be conducting interviews on this topic for my PhD research and I would like to invite you to participate in the interviews.

If you decide to participate in the interview, you will only be asked questions about national human rights institutions and their work with refugees; what you may understand about their work; the activities that you may have participated in; your opinion about the effect that their work may have had on the situation of refugees and your views about challenges that they may face when doing this work. I will not ask you questions about your name, contact details, job title or immigration status and any other personal information. There will not be any financial costs involved for participating in the study and you will not receive any payment for your participation in the interview.

The interview will take about 90 minutes. The interviews will be audio-recorded so I do not have to take too many notes during the interview. If you do not want to be recorded then the interview will continue without a recording being done. You do not have to participate in the interviews; the choice has to be yours. You may also withdraw your participation at any point without this affecting any advice or assistance you may be receiving from another organization or government institution. Your participation will not have a direct benefit to you. However, the information collected will be used to suggest ways that national human rights institutions can improve the protection of refugee rights in this country.

All the information collected will be kept safe and only my PhD supervisor and I will be able to access this information. The information collected during the study will be reported on, but the report or publication will not have any information to show that you provided the information.

#### **Do you agree to participate in this study?**

☐ **Yes**                      ☐ **No**

If yes, please confirm your consent by ticking the boxes below, then sign the form:

- ☐ I confirm that I have read and understood the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily
- ☐ I understand that my participation is voluntary and I am free to withdraw at any time without giving reason and without any consequence
- ☐ I understand that any information that I provide may be used in future reports, articles or presentations by the researcher
- ☐ I understand that my name will not appear in any reports, articles or presentations
- ☐ I agree to have the interview recorded for purposes of transcription

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Date                                      Signature/Thumb print of participant

\_\_\_\_\_  
 Researcher                                      Date                                      Signature

*'If you have concerns about the research, its risks and benefits or about your rights as a research participant in this study, you may contact the Law Faculty Research Ethics Committee Administrator, Ms Lamize Viljoen, at +27 (0) 21 650 3080 or at [lamize.viljoen@uct.ac.za](mailto:lamize.viljoen@uct.ac.za). Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.29, Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701.'*

## Appendix 5: Interview Guide for Refugees

### IN-DEPTH INTERVIEW GUIDE FOR REFUGEES -DRAFT

Date: \_\_\_\_\_

Country: \_\_\_\_\_

Time: \_\_\_\_\_

#### INTRODUCTION (Interviewer instruction: Go through the introduction even if repeating what was said during recruitment)

- a) *Thank you for agreeing to have this interview.*
- b) *I am Vivian Nasaka John-Langba a PhD student from University of Cape Town Faculty of Law I am conducting research to determine the extent to which national human rights institutions are promoting and protecting the rights of refugees.*
- c) *Please feel free to talk openly. If you feel uncomfortable talking about something, or would rather not answer a question, please tell me. You do not have to answer questions if you do not want to.*
- d) **Time:** *The interview will take up to an hour and half. If you need to take a break, please inform me and we can stop*
- e) **Confidentiality and anonymity:** Everything said in this interview will be treated as confidential. Only my supervisor and I will have access to your responses. When I report on the findings, I will make sure that information you provide will not be linked back to you.
- f) **Recording:** *Do you mind if I record this interview? It's only for research purposes. That way I don't have to write down lots of notes while we talk. Nobody except my supervisor and I will listen to the recording. [Interviewer instruction: Wait for the participant's response.] Ensure to speak clearly so that I can hear what was said on the tape.*
- g) **Test recording:** *Before we start, I would like to make sure that the tape recorder is working properly. (Interviewer instruction: Start the recording: say your name and the date, and something light-hearted – like an observation about the weather today. Ask the respondent an innocuous question to get their voice –or ask about their age and occupation sitting in their natural position where they will sit for the interview. Stop the recording and play back to make sure it is working and that you can hear both your voices.)*

**Interviewer instruction: Start recording: Remember to press record again before interview starts. Once again, state the date and place, your name and the respondent's occupation. Make sure that tape recorder is positioned so that your voices are still audible, even when looking down at the paper. Write down as much of the answers as possible in the spaces provided.**

1. How did you first hear about the national human rights institution (s) you have interacted with? [Probe: *Was it through an activity, community leaders, radio, TV, service provider?*]

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2. Have you ever approached such institutions for assistance? [Probe: *If yes, what type of assistance? Did you lodge a complaint? What was your complaint about? Did you receive the assistance you sought? From your experience or that of a refugee you know, would you approach the institution for assistance in future? If no, why?*]

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3. What activities hosted by any of these institutions have you participated in? [Probe: *What type of activity-Refugee Day? Community engagement? Anti-xenophobia activity? Was it the only activity? If not which other activity? Do you know of any other refugee or asylum seeker who has participated in such activities?*]

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4. Did you find the activity useful? [Probe: *Was there important information about refugee rights that you received at the event?*]

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In your opinion, do you think that the institution you interacted with is adequately promoting and protecting the rights of refugees? [Probe: *Are you aware of anything being done for refugees in general? Is there continuous engagement with the community or its leaders? Are you aware of anything being done for refugee women, children, persons with disabilities or the elderly? Do you know someone within the institution that you can approach when you have a concern related to your rights as a refugee or as an asylum seeker?*]

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5. What do you think these institutions should do to improve their work in relation to refugees? [Probe: *Do you think the refugee community you come from knows about these institutions and their role to promote and protect your rights? Are they readily accessible?*]

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**I have now come to the end of the interview.**

1. Do you have any additional comments about national human rights institutions and their role in raising awareness about refugee rights that you would like to discuss?

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2. Do you have any other comments?

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**Interviewer instruction:** Thank the participant at the end of the interview

**OBSERVATIONS/NOTES** on interview (E.g. *was interview interrupted, delayed, dynamics of interview i.e. difficult or easy, main themes that emerged, any other information volunteered*)

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## Appendix 6: Interview Guide for Service Providers

### KEY INFORMANT INTERVIEW GUIDE FOR STAFF FROM ORGANISATIONS THAT PROVIDE SERVICES TO REFUGEES-DRAFT

Date: \_\_\_\_\_

Place: \_\_\_\_\_

Organization: \_\_\_\_\_

Time: \_\_\_\_\_

#### INTRODUCTION (Interviewer instruction: Go through the introduction even if repeating what was said during recruitment)

- a) *Thank you for agreeing to have this interview.*
  
- b) *I am Vivian Nasaka John-Langba a PhD student from University of Cape Town Faculty of Law I am conducting research to determine the extent to which national human rights institutions are promoting and protecting the rights of refugees.*
  
- c) *Please feel free to talk openly. If you feel uncomfortable talking about something, or would rather not answer a question, please tell me. You do not have to answer questions if you do not want to.*
  
- d) **Time:** *The interview will take up to an hour and half. If you need to take a break, please inform me and we can stop*
  
- e) **Confidentiality and anonymity:** Everything said in this interview will be treated as confidential. Only my supervisor and I will have access to your responses. When I report on the findings, I will make sure that information you provide will not be linked back to you.
  
- f) **Recording:** *Do you mind if I record this interview? It's only for research purposes. That way I don't have to write down lots of notes while we talk. Nobody except my supervisor and I will listen to the recording. [Interviewer instruction: Wait for the participant's response.] Ensure to speak clearly so that I can hear what was said on the tape.*
  
- g) **Test recording:** *Before we start, I would like to make sure that the tape recorder is working properly. (Interviewer instruction: Start the recording: say your name and the date, and something light-hearted – like an observation about the weather today. Ask the respondent an innocuous question to get their voice –or ask about their age and occupation sitting in their*



natural position where they will sit for the interview. Stop the recording and play back to make sure it is working and that you can hear both your voices.)

**Interviewer instruction: Start recording: Remember to press record again before interview starts. Once again, state the date and place, your name and the respondent's occupation. Make sure that tape recorder is positioned so that your voices are still audible, even when looking down at the paper. Write down as much of the answers as possible in the spaces provided.**

## INTERVIEW GUIDE

1. How long have you worked in this position? [**Probe:** *Any relevant background and experience on refugee rights*]

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2. What is your organisation's mandate? [**Probe:** *How does it relate to promoting and protecting the rights of refugees*]

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3. Has your organisation participated, organized or implemented any interventions in the last 5 years relating to refugees? [**Probes:** *Legislation; Policy; Conditions of detention; Strategic litigation; Did you collaborate with any of the state institutions established to promote and protect human rights in any of the interventions mentioned above? If yes, in what manner. If no, what were the reasons?*]

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**Next, I would like to ask you some questions about your institution's relationship with national human rights institutions**

4. Within the context of refugee protection, which national human rights institution(s) does your organisation partner with or have a formal working relationship? [**Probes:** *How useful is such a formal relationship in promoting and protecting the rights of refugees? Is there a focal point person within the institution on refugee matters that you liaise with? How often do you interact-on an ad hoc basis or regular scheduled meetings*]

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5. Do you think national human rights institutions have made an impact in the promotion and protection of refugee rights in this country? [**Probe:** *Do you feel that there are higher levels of awareness on refugee rights? Are pertinent issues such as xenophobia, discrimination, access to basic services, irregular detention being addressed by the NHRI(s)? How about the rights of refugee women, children, persons with disabilities and the elderly? Are recommendations on refugee rights from organisations such as yours being taken on board by the NHRIs? Do you feel that the NHRI(s) is/are engaging effectively with the government on refugee rights?*]

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6. From your experience, do you think that NHRIs have the capacity to effectively address the rights of refugees? [**Probe:** *Do they have the expertise, resources- both human and financial, access to refugee communities?*]

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7. From your experience, what challenges or barriers do national human rights institutions usually face when addressing the rights of refugees? [**Probe:** *Are NHRIs trusted to deliver on the promise of protection?*]

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8. In your opinion, in what ways could national human rights institutions influence implementation of policies to ensure effective promotion and protection of the rights of refugees and asylum seekers? [**Probe:** *engagement with government, human rights education and training of first line service providers such as police, healthcare service providers, educators, immigration officials*]

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**I have now come to the end of the interview.**

9. Do you have any additional comments related to the role of NHRIs that you would like to discuss?

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10. Do you have any other comments?

11. Is it okay to contact you again for further information and or clarification on what we have discussed?

☐ Yes

☐ No

**Interviewer instruction: Thank the participant at the end of the interview**

**OBSERVATIONS/NOTES on interview (E.g. *was interview interrupted, delayed, dynamics of interview i.e. difficult or easy, main themes that emerged, any other information volunteered*)**

## Appendix 7: Interview Guide for NHRIs

### IN-DEPTH INTERVIEW GUIDE FOR NHRI STAFF-Final

Date:

Country:

**INTRODUCTION (Interviewer instruction: Go through the introduction even if repeating what was said during recruitment)**

- a) *Thank you for agreeing to have this interview.*
- b) *I am Vivian Nasaka John-Langba a PhD student from University of Cape Town Faculty of Law I am conducting research to determine the extent to which national human rights institutions are promoting and protecting the rights of refugees.*
- c) *Please feel free to talk openly. If you feel uncomfortable talking about something, or would rather not answer a question, please tell me. You do not have to answer questions if you do not want to.*
- d) **Time:** *The interview will take up to an hour and half. If you need to take a break, please inform me and we can stop*
- e) **Confidentiality and anonymity:** Everything said in this interview will be treated as confidential. Only my supervisor and I will have access to your responses. When I report on the findings, I will make sure that information you provide will not be linked back to you.
- f) **Recording:** *Do you mind if I record this interview? It's only for research purposes. That way I don't have to write down lots of notes while we talk. Nobody except my supervisor and I will listen to the recording. [Interviewer instruction: Wait for the participant's response.] Ensure to speak clearly so that I can hear what was said on the tape.*
- g) **Test recording:** *Before we start, I would like to make sure that the tape recorder is working properly. (Interviewer instruction: Start the recording: say your name and the date, and something light-hearted – like an observation about the weather today. Ask the respondent an innocuous question to get their voice sitting in their natural position where they will sit for the interview. Stop the recording and play back to make sure it is working and that you can hear both your voices.)*

**Interviewer instruction: Start recording: Remember to press record again before interview starts. Once again, state the date and place, your name and the respondent's occupation. Make sure that tape recorder is positioned so that your voices are still audible, even when looking down at the paper. Write down as much of the answers as possible in the spaces provided.**

**INTERVIEW GUIDE:**

1. How long have you worked on refugee matters? [Probe: *Any relevant background or experience in refugee rights?*]

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2. What is your institution's mandate? [Probe: *How does it relate to promoting and protecting the rights of refugees; Since the institution's establishment has the NHRI dealt directly with matters relating to the refugees and asylum seekers? Is this on an ad hoc basis? Do you receive complaints from refugees? Do you know the number in the past five years and what they relate to? Who are your stakeholders?*]

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3. Are there any strategies that this institution has developed to advance the rights of refugees and asylum seekers? [Probe: *Are there any working groups? Is this an area that is prioritized? Is there a focal point person working on refugee rights? If not, what are the reasons? Is there any focus on refugee women, children, elderly or persons with disabilities?*]

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4. Has your institution organized/participated in/implemented any interventions in the last 5 years relating to refugees? [**Probes:** *Legislation; Policy; Research, Conditions of detention; Strategic litigation; Did you collaborate with any of the state institutions established to promote and protect human rights in any of the interventions mentioned above? If yes, in what manner. If no, what were the reasons?*]

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5. Do you consider the current domestic refugee protection framework sufficient to address the rights of refugees? [Probes: *Did you play a role in the development of the legislation and policy? In your opinion, are there specific gaps in the law and policy? How do these gaps affect your work with refugees? What's your view on how the Government is implementing the policy? In what way would you recommend that the policy or relevant legislation be enhanced? Are there any proposed pieces of legislation that may impact on the framework?*]

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6. In your opinion, has your institution in its oversight role contributed towards the effective implementation of this country's policy towards refugees? [Probe: *What avenues do you use to highlight the status of refugee protection? Do you engage with regional and international human rights mechanisms on refugee related matters? Do you contribute to any regional or international processes on refugee-related issues?*]

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7. Are there any challenges or barriers that you have faced in relation to your work with refugees? [Probes: *What do these challenges relate to-monitoring role? Resistance from authorities to engage in refugee matters? Limited resources to effectively implement programmes? Difficulty in accessing refugee communities? Lack of awareness of your role broadly and specifically among refugee communities? How have you addressed these challenges or barriers?*]

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8. In your opinion, how can your institution's capacity to address refugee rights be strengthened? [Probe: *increase in human and financial resources? Increase community engagement/mobilization? Increase engagement with international or regional human rights mechanisms*]

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9. Are there any opportunities that NHRIs can seize to strengthen their capacity to effectively promote and protect the rights of refugees? [Probe: *Opportunities for strategic engagement, political climate/political will, private sector engagement, collaboration with higher educational institutions, partnerships with local human rights NGOs; Do you think there have been missed opportunities?*]

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10. I have no further questions. Is there anything else you would like to discuss before we finish the interview?

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11. Is it okay to contact you again for further information and or clarification on what we have discussed?

☐ Yes

☐ No

**Interviewer instruction: Thank the participant at the end of the interview**

**OBSERVATIONS/NOTES on interview (E.g. *was interview interrupted, delayed, dynamics of interview i.e. difficult or easy, main themes that emerged, any other information volunteered*)**

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### Appendix 8: List of Participants

	<b>Interviewee Coded identity</b>	<b>City</b>	<b>Country</b>	<b>Date of interview</b>	<b>Means of interview</b>
1	Service provider 1	Durban	South Africa	26/09/2018	In-person
2	Service provider 2	Johannesburg	South Africa	18/09/2018	Telephonic
3	Service provider 3	Durban	South Africa	18/11/2018	Telephonic
4	Service provider 4	Cape Town	South Africa	27/11/2018	Telephonic
5	Service provider 5	Cape Town	South Africa	19/11/2018	
6	Service provider 6	Durban	South Africa	03/12/2018	In-person
7	Service provider 7	Nairobi	Kenya	14/03/2019	In-person
8	Service provider 8	Nairobi	Kenya	13/03/2019	Telephonic
9	Service provider 9	Nairobi	Kenya	7/03/2019	In-person
10	Refugee 1	Durban	South Africa	15/09/2018	In-person
11	Refugee 2	Durban	South Africa	21/09/2019	Telephonic
12	Refugee 3	Cape Town	South Africa	17/10/2018	Telephonic
13	Refugee 4		South Africa	17/10/2018	Telephonic
14	Refugee 5	Nairobi	Kenya	8/03/2019	In-person
15	Refugee 6	Nairobi	Kenya	8/03/2019	In-person
16	Refugee 7	Nairobi	Kenya	9/03/2019	In-person
17	NHRI 1	Johannesburg	South Africa	28 & 29/03/2019	Telephonic
18	NHRI 2	Johannesburg	South Africa	3/09/2019	Telephonic
19	NHRI 3	Nairobi	Kenya	7/03/2019	Telephonic